1 In Court of Claims of the United States

No. F–205

THE CREEK NATION
vs.
THE UNITED STATES

I. *History of proceedings*

On July 3, 1926, the plaintiff filed its original petition.

On July 23, 1926, by leave of court, the plaintiff filed its amended petition.

On June 24, 1927, by leave of court, the plaintiff filed its second amended petition, which is as follows:

II. *Second amended petition. Filed June 24, 1927*

To the honorable the Court of Claims:

The petitioner, the Creek Nation, respectfully represents—

I

That by a certain act of Congress, approved May 24th, 1924 (United States Statutes at Large, vol. 43, part I, page 139), petitioner was authorized and empowered to bring this action. That said act was later modified by a joint resolution (44 Stat. 568) permitting plaintiff to bring separate suits on one or more causes of action.

2 II

That by a treaty duly entered into by the United States and petitioner on the 14th day of February 1833, the United States granted, in fee simple to petitioner, the following described lands to wit:

"Beginning at the mouth of the north fork of the Canadian River, and running northerly four miles; thence running a straight line so as to meet a line drawn from the south bank of the Arkansas River opposite to the east or lower bank of Grand River, at its junction with the Arkansas, and which runs a course, south 44 degrees west, one mile, to a post placed in the ground; thence along said line to the Arkansas, and up the same and the Verdigris River to where the old territorial line crosses it; thence along said line north to a point twenty-five miles from the Arkansas River, where the old territorial line crosses the same; thence running a line at right angles with the territorial line aforesaid or west to the Mexico line; thence along the said line southerly to the Canadian River or to the boundary of the Choctaw country; thence down said river to the place of beginning."

III

That by article 3 of the treaty of 1866 (14 Stat. 785), the Creek Nation ceded to the United States "the west half of their entire domain, to be divided by a line running north and south." That article 8 of said treaty is as follows:

3 "It is agreed that the Secretary of the Interior forthwith cause the line dividing the Creek country, as provided for by the terms of the sale of Creek lands to the United States in article third of this treaty, to be accurately surveyed under the direction of the Commissioner of Indian Affairs, the expenses of which survey shall be paid by the United States."

IV

That on August 22nd and 24th, 1871, Frederick W. Bardwell, under the direction of the Commissioner of Indian Affairs, surveyed and established the boundary line between said Creek Nation and the land ceded by it to the United States. That said Creek national domain had, at said time, never been accurately surveyed and that said Bardwell divided said national domain without any data by which to make an accurate division. That said Creek Nation, at said time, complained that more than one half of their national domain had been taken by the running of said line; but that said complaints were disregarded and that on the 5th day of February 1872 the Secretary of the Interior approved said Bardwell line, and that said Bardwell line thereby became established as the west boundary of the Creek Nation.

V

4 That in 1872 one E. N. Darling, having been directed to divide said ceded land into sections, closed the corners of his eastern line of sections east of said Bardwell line, thus overlapping said Bardwell line and making a new north and south line east of said Bardwell line and within the lands retained by the Creek Nation.

VI

That from various surveys that had been made, the Creeks learned, in 1881, that said Bardwell line had actually taken over 200,000 acres of their land which they had not ceded, and for which they had received no compensation. The Creek Nation continuing to press its claim to this land, Congress, by act approved March 3rd, 1885 (23 Stat. 367), provided, that unless said Creek Nation should, within twelve months, by an act of its national council, accept and ratify said Bardwell line, no payments would be made of any money due them by the United States under their various treaty provisions.

That in compliance with said act of Congress, said Creek National Council passed said required resolution, accepting and ratifying said Bardwell line, a copy of which resolution is hereto attached as exhibit A. That said Bardwell line thereby became by an act of Congress, ratified by the Creek Nation, the western boundary of said Creek Nation.

VII

That notwithstanding the fact that the west boundary of plaintiffs' land had been thus defined and established, certain maps in the General Land Office made from the erroneous Darling survey, showed a strip of land, east of the Bardwell line, containing 5,575.57 acres, extending along said entire boundary, to be the property of the United States.

VIII

That when said lands of the United States, west of said Bardwell line, were, on September 21, 1891, opened for settlement, the General Land Office did, on account of said erroneous map, through error and inadvertence, permit said strip of land, east of said Bardwell line, to be opened to settlement, later through error and inadvertence, did issue patents therefor.

IX

That said situation having been called to its attention, Congress did, on June 21st, 1906 (34 Stat. 325), pass an act redeclaring said Bardwell line to be the west boundary of said Creek Nation. But that although Congress had thus declared said strip of land to be still the property of the Creek Nation, the defendant, whose duty it was to take action on behalf of petitioner, failed to have said patents canceled, and remove said trespassers from the land of petitioner.

X

That the defendant has always at all times mentioned herein, had entire control of the affairs of petitioner, and has administered them as its own, and that, therefore, plaintiff has not had, nor has it now, any redress or means to recover said land, except through the action of the defendant.

XI

That although said situation was well known to defendant, and although it was often requested to put plaintiff in possession of said land, defendant has refused and omitted so to do. Plaintiff has been, during all said time, and now is, excluded from the use and occupancy of said land.

Wherefore, plaintiff asks for judgment against defendant for the full value of said land with interest at six percent per annum from such date as the proof shows it is entitled.

THE CREEK NATION,
By E. J. VAN COURT,
Its Attorney of Record.

Counsel:
CHESTER I. LONG,
GEO. E. CHAMBERLAIN,
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W. E. STANLEY,
SAMUEL W. MCINTOSH,
ELTON W. STANLEY.

7 [*Duly sworn to by E. J. Van Court, jurat omitted in printing.*]

Exhibit A to second amended petition

Whereas, by act of Congress approved March 3d, 1885, entitled:

"An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes "An appropriation for interest money was made for the benefit of the Muskogee Nation, providing that no part of the same shall
8 be paid unless the Creek Nation shall, within twelve months, and in pursuance of a resolution of its national council first had and obtained, make, and file in the office of the Secretary of State, an acceptance and ratification of the survey made and approved by the Department, under the treaty of June 14th, 1866. Therefore,

"*Be it enacted by the national council of the Muskogee Nation:* That the survey of the line intended to define and designate the west half of the entire domain of the Creek Nation, ceded to the United States by the third article of the treaty, proclaimed the eleventh day of August, eighteen hundred and sixty-six, for the purpose of settling Indians and freedmen thereon, and which survey was approved by the Secretary of the Interior on the fifth day of February, eighteen hundred and seventy-two, be and the same is hereby accepted and ratified; and the principal chief is hereby instructed to file in the office of Secretary of State of the United States, a duly authenticated copy of this act at as early a day as practicable."

Approved November 4th, 1885.

9 III. *General traverse. Filed July 28, 1927*

And now comes the Attorney General, on behalf of the United States, and answering the second amended petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the second amended petition be dismissed.

HERMAN J. GALLOWAY,
Assistant Attorney General.

IV. *Argument and submission of case*

On May 11, 1931, this case was argued and submitted on merits by Mr. E. J. Van Court, for plaintiff, and by Mr. Charles H. Small, for defendant.

10 V. *Special findings of fact, conclusion of law, and opinion of the court by Williams, J.*

Filed March 13, 1933

Mr. E. J. Van Court for plaintiff. Messrs. Paul M. Niebell, Chester I. Long, Geo. E. Chamberlain, Peter Q. Nyce, J. D. Houston, Austin M. Cowan, Claude I. Depew, James G. Norton, W. E. Stanley, Samuel W. McIntosh, and Elton W. Stanley, were on the brief.

Mr. Charles H. Small, with whom was Mr. Assistant Attorney General Charles B. Rugg, for the defendant. Mr. George T. Stormont was on the brief.

This case having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

Special findings of fact

I

By an act of Congress approved May 24, 1924 (43 Stat. 139), it was provided:

"That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitations, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States: *Provided, however*, That the provisions of this act shall not be construed to confer jurisdiction upon the court to hear, examine, consider, and adjudicate any balance claimed to be due on the so-called Loyal

Creek claim, or any amount claimed to be due to equalize allotments among members of the Creek Tribe.

"SEC. 2. Any and all claims against the United States within the purview of this act shall be forever barred unless suit be instituted or petition filed as herein provided in the Court of Claims within 5 years from the date of approval of this act, and such suit shall make the Creek Nation party plaintiff and the United States party defendant. The petition shall be verified by the attorney or attorneys employed to prosecute such claim or claims under contract with the Creeks approved by the Commissioner of Indian Affairs and the Secretary of the Interior; and said contract shall be executed in their behalf by a committee chosen by them under the direction and approval of the Commissioner of Indian Affairs and the Secretary of the Interior. Official letters, papers, documents, and records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said Indian nation to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys of said Indian nation.

"SEC. 3. In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian nation, but any payment which may have been made by the United States upon any claim against the United States shall not operate as an estoppel, but may be pleaded as an offset in such suit.

"SEC. 4. That from the decision of the Court of Claims in any suit prosecuted under the authority of this act, an appeal may be taken by either party as in other cases to the Supreme Court of the United States.

"SEC. 5. That upon the final determination of any suit instituted under this act, the Court of Claims shall decree such amount or amounts as it may find reasonable to be paid the attorney or attorneys so employed by said Indian nation for the services and expenses of said attorneys rendered or incurred prior or subsequent to the date of approval of this act: *Provided*, That in no case shall the aggregate amounts decreed by said Court of Claims for fees be in excess of the amount or amounts stipulated in the contract of employment, or in excess of a sum equal to 10 per centum of the amount of recovery against the United States.

"SEC. 6. The Court of Claims shall have full authority by proper orders and process to bring in and make parties to such suit any or all persons deemed by it necessary or proper to the final determination of the matters in controversy.

"SEC. 7. A copy of the petition shall, in such case, be served upon the Attorney General of the United States, and he, or some attorney from the Department of Justice to be designated by him, is hereby directed to appear and defend the interests of the United States in such case."

Under the provisions of this act, the plaintiff filed an original petition, an amended petition, and a second amended petition, on July 3, 1926, July 23, 1926, and June 24, 1927, respectively; in answer to each of which the United States duly filed a general traverse.

II

By articles II and III of the treaty of February 14, 1833, between the United States and the Creek Nation (7 Stat. 417, 418), the United States agreed to grant to the Creek Nation certain land in what is now Oklahoma.

Article II contains a general description of the grant.

Article III is as follows:

12 "The United States will grant a patent, in fee simple, to the Creek Nation of Indians for the land assigned said nation by this treaty or convention, whenever the same shall have been ratified by the President and Senate of the United States—and the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation, and continue to occupy the country hereby assigned them."

III

By the treaty of June 14, 1866, between the United States and the Creek Nation (14 Stat. 785, 786, 788), the Creek Nation ceded and conveyed to the United States, for purposes indicated therein, the west half of their entire domain, article III of the treaty reading in part as follows:

"In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Creeks hereby cede and convey to the United States, to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon, the west half of their entire domain, to be divided by a line running north and south; the eastern half of said Creek lands, being retained by them shall, except as herein otherwise stipulated, be forever set apart as a home for said Creek Nation; * * *"

Article VIII of the treaty of June 14, 1866, provided as follows:

"It is agreed that the Secretary of the Interior forthwith cause the line dividing the Creek country, as provided for by the terms of the sale of Creek lands to the United States in article third of this treaty, to be accurately surveyed under the direction of the Commissioner of Indian Affairs, the expenses of which survey shall be paid by the United States."

IV

In 1871, Frederic W. Bardwell, under the direction of the Indian Office, and pursuant to the provisions of article VIII of the treaty of June 14, 1866, *supra*, surveyed the line dividing the Creek country. It later developed that this line, as surveyed and run by Bardwell,

was not a true north and south line as intended by the treaty of 1866, and that a portion of the Creek land not ceded to the United States by this treaty was included with the land west of the Bardwell line.

Following a controversy on this score, Congress by its act of March 3, 1885 (23 Stat. 362, 367), made provision for the withholding of the current appropriations for the Creek Nation, except they should, within 12 months and in pursuance of a resolution of its national council first had and obtained, make and file in the office of the Secretary of State an acceptance and ratification of the Bardwell survey made and approved by the Department under the treaty of June 14, 1866; and it was further provided that the additional lands acquired by the United States through this survey should be held by the United States under the provisions of said treaty of 1866. This mandate was duly accepted by the Creek Nation and subsequently reaffirmed through the agreement of January 19, 1889, between the United States and the Creek Nation, as set forth in the act of Congress approved March 1, 1889 (25 Stat. 757, 759).

13 V

By article I of the agreement of Jan. 19, 1889, ratified by the act of March 1, 1889 (25 Stat. 757, 758), the Creek Nation ceded and granted to the United States "without reservation or condition, full and complete title to the entire western half of the domain of the said Muscogee (or Creek) Nation lying west of the division line surveyed and established under the said treaty of eighteen hundred and sixty-six", and also granted and released to the United States "all and every claim, estate, right, or interest of any and every description in or to any and all land and territory whatever, except so much of the said former domain of the said Muscogee (or Creek) Nation as lies east of the said line of division, surveyed and established as aforesaid, and is now held and occupied as the home of said nation."

Section 2 of the act of March 1, 1889, provided that the lands acquired by the United States thereunder—the lands west of the Bardwell line—should be a part of the public domain of the United States.

VI

The west line of the diminished Creek Nation—the Bardwell line—was, by section 1 of the act of Congress approved May 2, 1890 (26 Stat. 81, 82), made a part of the boundary line between Oklahoma Territory and the Indian Territory.

VII

On February 18, 1867, a treaty was concluded between the United States and the Sac and Fox Indians relative to the future home of the latter in the Indian country south of Kansas (15 Stat. 495),

and thereafter an area was selected immediately west of the plaintiff's reduced reservation and was divided from it by the Bardwell line.

Pursuant to the provisions of article VI of the treaty of February 18, 1867, a survey was made of the Sac and Fox Reservation by E. N. Darling in 1872, who ran his divisional lines and closing corners east of the Bardwell line and into the land of the Creek Nation.

VIII

The Darling survey of 1872 was examined and approved on February 15, 1873, by the Commissioner of the General Land Office without discovery of the error.

IX

As a result of the erroneous survey of 1872, and approval thereof by the Commissioner of the General Land Office, a certain strip of land between the closing corners of the Darling survey and the Bardwell line, aggregating 5,575.57 acres, was erroneously included within the area of the Sac and Fox Reservation and was thereafter occupied by that nation to the exclusion of the Creek Nation.

14

X

In 1875, for the purpose of dividing the sections of the Sac and Fox Reservation into 40-acre tracts, H. C. F. Hackbush resurveyed the Sac and Fox territory, and followed the lines run by the Darling section lines and perpetuated the errors of the survey of 1872 by extending the survey lines east of the Bardwell line and into the reservation of the Creek Nation.

Without discovery of the error, the Hackbush survey was examined and approved by the Acting Commissioner of the General Land Office on September 10, 1875.

XI

By article I of the agreement of June 12, 1890, between the United States and the Sac and Fox Nation, as set forth in the act of Congress approved February 13, 1891 (26 Stat. 749, 750), the Sac and Fox Nation ceded to the United States "all their title, claim, or interest" to the land thereinafter described by metes and bounds, "beginning at a point on the left bank of the north fork of the Canadian River, where the west boundary line of the Creek Reservation crosses the same"; the west boundary line of the Creek Nation constituting the line established by the Bardwell survey.

XII

Through the proclamation dated September 18, 1891 (27 Stat. 989) made pursuant to the act of Congress, approved February 13,

1891, the President ordered that, on September 22, 1891, after allotments were made to the Sac and Fox Indians, the residue of the area ceded by the Sac and Fox Nation be opened to white settlement.

XIII

Thereafter allotments were made to individual members of the Sac and Fox Nation and patents were issued to settlers covering the entire area of the Sac and Fox Reservation and covering the area east of the plaintiff's western boundary to the extent of the 5,575.57 acres in question.

XIV

Under the direction of the Department of the Interior, resurveys of the west boundary of the Creek Nation were made in 1895 and 1896 and 1905, through which the original boundary line as surveyed by Bardwell was reestablished as the west boundary of the Creek Nation; and, by the act of Congress approved June 21, 1906 (34 Stat. 325 (364), the boundary line between the Creek Nation, Indian Territory, and the Territory of Oklahoma, as surveyed by Frederic W. Bardwell in 1871 and reestablished by the Geological Survey in 1895 and 1896, was declared to be the west boundary of the Creek Nation.

15 XV

A certain tract consisting of 118.4 acres lying in the extreme southern part of said tract of 5,575.57 acres immediately east of the Bardwell line was patented to settlers under the homestead laws, and was also subsequently allotted to members of the Creek Nation. At the present time these 118.4 acres are in the possession of the settlers having patents therefor. 52.09 acres, also lying in the southern part of same, were sold as unallotted lands of the Creek Nation, but in the adjustment of the acreage included in the overlap, the Creek Nation has received no money for the acreage involved, except as to the tract of 2.88 acres sold to James H. Kean.

XVI

As a result of the erroneous survey by Darling in 1872 and the subsequent disposition of the area in question by allotments or issuance of patents to settlers, the plaintiffs have been deprived since 1872 of the use and enjoyment of a part of their reservation of the aggregate area of 5,575.57 acres, excepting only 118.4 acres allotted or patented to certain members of the Creek Nation.

XVII

From 1846 to 1861, inclusive, the United States paid out of the fund known as the Creek Orphan Fund, established under the

treaty of March 24, 1832, with the Creek Nation (7 Stat. 366), the sum of $69,956.68 for the current expenses of the Indian department within the southern superintendence for the erection of schools, etc.

During the period from 1861 to 1867 there was also expended from the said Creek Orphan Fund the sum of $106,799.68 for the subsistence of certain loyal refugee Indians in Kansas during the Civil War. Of this amount only $6,848.83 was expended for the benefit of refugees of the Creek Nation.

XVIII

Under the act of August 7, 1882 (22 Stat. 301) provision was made for the reimbursement of the Creek Orphan Fund for the said diversions and in connection therewith it was provided as follows:

"That the Secretary of the Interior is hereby authorized and instructed to charge the sum of sixty-nine thousand nine hundred and fifty-six dollars and sixty-eight cents, used for general purposes of the Creek Nation, against the general fund of said nation, and said sum shall be retained by the Secretary of the Interior in such installments as shall not seriously embarass the object of the annual appropriations for the support and necessities of the Creek Nation; but nothing in this act contained shall be construed to prevent the United States from asserting its right to be reimbursed by the Creek Nation in any future settlements therewith the further sum of one hundred and six thousand seven hundred and ninety-nine dollars and sixty-eight cents, expended by the United
16 States out of the Creek Orphans' Fund for the support of loyal Creek refugees."

The Secretary of the Interior has never reimbursed the said sum, or any part thereof, from appropriations made for the Creek Nation.

XIX

The fair average market value, for all purposes, of the land involved, was on July 23, 1926, $30.00 per acre. This value includes the surface, lease, and royalty values.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is entitled to recover from the United States the sum of $163,628.70, and that the defendant is entitled to recover from the plaintiff on its counterclaim the sum of $76,805.51.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of eighty six thousand eight hundred twenty-three dollars and nineteen cents ($86,823.19).

Opinion

WILLIAMS, Judge, delivered the opinion of the court:

This suit is brought under the jurisdictional act of May 24, 1924 (43 Stat. 139), which confers jurisdiction upon the Court of Claims to hear, examine, adjudicate and render judgment "in any and all legal and equitable claims arising under or growing out of any treaty, or agreement between the United States * * *" and the plaintiff Indians, "or arising under or growing out of any act of Congress in relation to Indian affairs * * *" which "have not been heretofore determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States", excepting only "the so-called loyal Creek" claims or any claims with reference to the equalization of allotments heretofore made to the members of the Creek Nation.

By a subsequent enactment (44 Stat. 568) plaintiff was authorized to prosecute its claim in a single suit or bring a separate suit on one or more of such claims. This is one of a series of suits brought under the authority of these acts.

Under the treaty of February 14, 1833 (7 Stat. 417), the United States granted to the Creek Nation, in fee simple, a large tract of land in the then Indian Territory. Subsequently, under the treaty of June 14, 1866 (14 Stat. 785), the Creek Nation ceded back to the United States the entire west half of this tract, to be divided by a line running north and south, which was to be surveyed under the direction of the Commissioner of Indian Affairs.

By the treaty of February 18, 1867 (15 Stat. 495), the United States ceded to the Sac and Fox Indians a tract of land not exceeding 750 square miles in Indian Territory south of Kansas. The lands given were to be selected under the direction of the Secretary of the Interior, and were to be surveyed as to their exterior boundary at the expense of the United States. It developed that the lands
17 selected for the Sac and Fox Reservation lay within that part of the Creek domain ceded to the United States under the treaty of June 14, 1866.

In August 1871 the official survey of the Creek lands was made pursuant to the provisions of the treaty of June 14, 1866, by one Frederic W. Bardwell, who ran and established the line dividing that portion of the Creek domain ceded by the Creek Nation to the United States from that portion of the domain retained by it. It developed later, and is now conceded, that the line as surveyed and run by Bardwell was erroneous, in that it was not a true north and south line as contemplated and required by the treaty, and that land not ceded by the Creek Nation to the United States was included in land lying west of the line. This error, however, has no bearing on the case as the Creek Nation, by the agreement of January 19, 1889 (25 Stat. 757), ratified and confirmed the line as run by Bardwell and ceded to the United States, without reservation or condition, full and complete title to all that part of its former domain lying

west of the line established by Bardwell. The Bardwell line, therefore, although erroneous, became the boundary line between the Creek Nation on the east and the Sac and Fox Nation on the west, and by the act of May 2, 1890 (26 Stat. 81), was designated as the boundary line between the Creek Nation and the new Territory of Oklahoma.

Pursuant to the provisions of the treaty of February 18, 1867, a survey of the Sac and Fox Reservation was made by one E. N. Darling in 1872, who divided the land into sections. Darling erroneously ran his division lines into the Creek domain and his closing corners were placed some distance to the east of the Bardwell line and upon land owned by the Creek Nation. As a result of this survey 5,575.57 acres of Creek lands were erroneously included in the Sac and Fox Reservation. In 1876 one Hackbusch resurveyed Darling's section lines, and in addition thereto subdivided the sections into 40-acre tracts. In this survey he perpetuated the errors of Darling by extending his survey east of the Bardwell boundary line into the Creek Nation. The Darling and Hackbusch surveys were approved by the Commissioner of the General Land Office on February 15, 1873, and September 10, 1875, respectively, apparently without discovery of the errors therein.

By article I of the agreement of June 12, 1890, between the United States and the Sac and Fox Nation, as set forth in the act of Congress of February 13, 1891 (26 Stat. 749), the Sac and Fox Nation ceded all its lands to the United States. It was provided in the agreement that after certain allotments had been made to the Sac and Fox Indians and provisional patents had been issued therefor, the residue of the land ceded should become public lands of the United States, and under such restrictions as may be imposed by law, be subject to white settlement. The 5,575.57 acres of land erroneously included in the Sac and Fox Reservation by the Darling survey were, under the aforesaid agreement and act of Congress, opened to settlement in September 1891, and patents to settlers thereon were subsequently issued by the United States. The original settlers, or persons holding title through them, are now in possession of the land.

Following the opening of the land to settlement and the issuing of patents to settlers thereon, numerous complaints were made to the Indian Office and to the General Land Office as to the conflict-
18 ing claims of homesteaders, Creek Indian allottees and others, in respect to titles to the land, especially those lands lying in that part of the area involved where patents to the same acts were issued to homesteaders, and allotments were made to citizens of the Creek Nation. The United States Geological Survey, in 1895 and 1896, resurveyed the west boundary of the Creek Nation and reestablished the original boundary line as surveyed by Bardwell in 1871. From these surveys the errors made by Darling in his survey of the Sac and Fox Reservation in 1873 clearly appeared, and the fact was established that the 5,575.57 acres of land in question had erroneously been included in that reservation. The Creek Nation, from that time

until now, has continuously and persistently asserted its right and title to the land, and has repeatedly urged before Congress its right to be restored to the possession of the same.

Up to this point in the case the plaintiff and the defendant are in substantial agreement. They agree that the 5,575.57 acres of land involved lie between the Bardwell line on the west and the Darling line on the east; that it was erroneously included as a part of the Sac and Fox Reservation by Darling in his survey, and that the plaintiff is entitled to compensation for the value of the land. The real issue between them is the question of the value of the land. The determination of this question hinges entirely upon the date at which such value is rightly computable. The ascertainment of this date, therefore, is the first question for decision.

The plaintiff contends that it was given fee-simple title to the land under the treaty of February 14, 1833; that it has never been divested of its title to the land; that it is the owner of the land at this time, and that under the jurisdictional act, referring its claim to this court, it is entitled to recover the value of the land as of the date of the filing of the petition herein.

The defendant's contention as stated in the brief is:

"If—and such appears to be the fact—in the area shown by the Darling survey as part of the Sac and Fox domain, land was included which as a matter of fact rightfully belonged to the Creek Nation, it is submitted that by the act of the Commissioner of the General Land Office on February 15, 1873, in approving the erroneous Darling survey, such land was on that date 'taken' by the United States. However wrongful this 'taking' may have been, it conclusively appears that it occurred on February 15, 1873.

"It is further submitted that, through the approval of the Darling survey on February 15, 1873, by the Commissioner of the General Land Office, all land included within the area shown by this survey of necessity thereupon became the property of the Sac and Fox Nation."

The defendant makes the further contention:

"It may here be observed that in the event there should be any doubt as to whether or not the land involved herein was 'taken' by the United States in 1873 through the act of the Commissioner of the General Land Office in approving the Darling survey—there can not be any doubt whatsoever that this land was either acquired from the Sac and Fox Nation, or 'taken' from the Creek Nation, by the United States through the act of Congress approved on February 13, 1891. Indeed, insofar as the land in question herein is concerned, it may be said that there cannot be the slightest doubt that Congress by its act approved on February 13, 1891, intended to accomplish and did accomplish one of two measures in respect of this land: (a) ratified and confirmed the act of the Commissioner of the General Land Office in 1873 in approving the Darling survey, and the United States acquired title to this

19

land from the Sac and Fox Nation; or (b) assuming that the Sac and Fox Nation had no right whatsoever to cede this land to the United States, ratified and confirmed the act of the Commissioner of the General Land Office of 1873 in approving the Darling survey, and thus 'took' the land in question from the Creek Nation."

The defendant cites no authority in support of the contention that the act of the Commissioner of the General Land Office in 1873, in approving the erroneous Darling survey, operated to divest the plaintiff of its title to the land involved, and to vest title thereto in the Sac and Fox Nation, and we know of no authority that does support it. There is nothing in the language of the treaty of 1867 (15 Stat. 495), under which the United States ceded to the Sac and Fox Nation its reservation, indicating an intention on the part of the Government to include in the grant the land involved in suit, or any land other than such as was then owned by the United States. Even if this land had been within the territorial limits of the grant, it would under a well established rule of the law have been impliedly excepted as coming within the terms of the grant, in the absence of specific language leaving no room for doubt as to the intention of the United States to include it as a part of such grant. (Wilcox v. Jackson (13 Pet. 498); Leavenworth, Lawrence & Galveston R. R. Co., v. United States (92 U. S. 733); United States v. Minnesota (270 U. S. 181).) This being true, can it be maintained that the act of the Commissioner of the General Land Office, in approving an erroneous survey, including the 5,575.57 acres as a part of the land granted to the Sac and Fox Nation, operated ipso facto to divest the plaintiff of its title to the land and vest title to the same in the Sac and Fox Nation? In other words, did the administrative act of the Commissioner of the General Land Office in approving an erroneous survey divest the plaintiff of its fee title to the land involved—a thing that Congress itself could only do, and that by the use of specific language leaving no room for doubt as to its intention? We think not.

The act of February 13, 1891, ratified and confirmed an agreement between the United States and the Sac and Fox Indians in which they ceded all their lands to the United States. Article I of the agreement described the land ceded by metes and bounds, the west boundary line of the Creek Reservation being designated as one of the boundaries of the area ceded. It is not contended that the 5,575.57 cares of land involved in this suit come within the limits of the area thus described, as this land lies east of the Creek Nation's western boundary line. It is claimed, however, that such land comes within the cession of Sac and Fox lands by virtue of the following language appearing at the conclusion of the precise description by metes and bounds of the land ceded:

"And all other land or country in Indian Territory, in which said Sac and Fox Nation has or claims any title, claim or interest."

20 It is obvious that the purpose of incorporating this general language in the agreement following the particular designation of the lands ceded was to protect the United States against any and all future claims of the Sac and Fox Indians growing out of the sale and transfer of their lands to the United States. The effect of the language used was to estop the Sac and Fox Nation from asserting at some future date claim of title, or right in any lands in the Indian Territory other than those designated in the agreement. The contention, therefore, that by virtue of this language the United States acquired title to any land not then the property of the Sac and Fox Nation, merely because that Nation claimed some title or interest therein, cannot be sustained. At most the United States acquired only such title in the 5,575.57 acres of land involved as the Sac and Fox Nation itself had in the land. The fee title to the land then being in the plaintiff, the United States under the act of February 13, 1891, acquired no title or interest in the land, other than the unfounded claim of the Sac and Fox Nation to the land, arising out of its occupancy of the same under the erroneous Darling survey.

We hold, therefore, that neither the treaty of 1867 under which the United States granted the Sac and Fox Nation its reservation, nor the action of the Commissioner of the General Land Office in 1873 in approving the erroneous survey of that reservation, nor the act of February 13, 1891, under which the Sac and Fox Nation ceded its lands to the United States, and under the provisions of which the 5,575.57 acres of land were opened to settlement, divested the plaintiff of its title to the land or its right to the possession thereof; that neither the United States nor the Sac and Fox Nation acquired any right, title, or interest in or to the said land by virtue of any of the agreements or acts of Congress aforesaid, or by or through the action of the Commissioner of the General Land Office in approving the erroneous survey in 1873. It follows that the plaintiff was the owner of the land when it was opened to settlement under the proclamation of the President, September 18, 1891. The Government of the United States had no title to it, and therefore its patents to settlers thereon did not operate to convey the land.

The conclusions just stated are supported by affirmative declarations by Congress, in acts approved both before and after the land was opened to settlement in 1891, that the Bardwell line was the west boundary line of the Creek Nation. The first of these acts, the act of March 1, 1889, has already been referred to as definitely fixing the original Bardwell line as the western boundary of the Creek Nation. While the errors made by Darling in his survey of the Sac and Fox Reservation were apparently not known at the time of this enactment, we do not regard that fact as material. The Creek Nation for several years had been pressing a claim against the Government for reimbursement for lands alleged to have been lost to it through the error of Bardwell in establishing the division line in 1871. Congress taking cognizance of this claim, in the act of March 3, 1885, 23 Stat. 362, provided that the Creek Nation should within twelve months,

and in pursuance of a resolution of its national counsel first had and obtained, make and file in the office of the Secretary of State an acceptance and ratification of the Bardwell survey made and approved by the department under the treaty of June 14, 1866.

21 The acceptance of this statutory mandate by the Creek Nation was effectuated by the act of March 1, 1889, supra.

Congress again in the act of June 21, 1906, declared the Bardwell line to be the western boundary line of the Creek Nation, using the following explicit language:

"That the boundary line between the Creek Nation, Indian Territory, and the Territory of Oklahoma, as surveyed by Frederic W. Bardwell in eighteen hundred and seventy-one, and reestablished by the Geological Survey in eighteen ninety-six is hereby declared to be the west boundary line of the Creek Nation."

This act was passed more than 30 years after the approval by the Commissioner of the General Land Office of the survey of the Sac and Fox Reservation, and more than 14 years after the 5,575.57 acres of land in question had been opened to settlement. Congress at the time was fully informed as to all the facts relating to the plaintiff's claim. The record discloses that committees of both the Senate and the House had repeatedly made exhaustive investigations as to every phase of the controversy. Numerous reports dealing with the matter, made from time to time by Commissioners of Indian Affairs, Secretaries of the Interior, and other administrative officials of the Government were considered by Congress. It is significant that no official of the Indian Office, of the General Land Office, or of the Department of the Interior having to do with these matters ever questioned the right or title of the Creek Nation in, or to, these lands, or ever asserted that the United States had title to them at the time they were opened to settlement in 1891. On the contrary, they, without exception, advised Congress that title to the land was in the Creek Nation and that settlers on the land to whom patents had been issued acquired no title to the land thereunder. The Commissioner of Indian Affairs in a report to the Secretary of the Interior, August 7, 1903, said:

"The Government of the United States is not a guarantor of the area within any description of land patented by it under the laws of the United States * * *. At the time the patents were issued, the land was a part of the property of the Creek Nation. The Government of the United States had no title to it, and therefore its patent did not operate to convey the land."

The Secretary of the Interior in a report to Congress on April 9, 1906, said:

"The homestead claimants have no legal title to the land in the Creek Nation east of the Bardwell line patented to them, and * * *"

The Secretary of the Interior in this report recommended to Congress that the 5,575.57 acres be appraised at their cash value and that payment therefor be made to the Creek Nation.

Under these circumstances, and with the undoubted intent and purpose of settling definitely all questions growing out of the various treaties, statutes, and administrative acts of officials of the Indian Office and the General Land Office dealing with the title to the land in controversy, Congress again, as it had done in the acts of March 3, 1885, March 1, 1889, and May 2, 1890, declared the Bardwell line to be the western boundary of the Creek Nation. The act of June 21, 1906, must be regarded as conclusive as to the Creek Nation's right and title to the land in controversy as of that date. The act
22 clearly contemplated the restoration of the land to the Creek Indians through appropriate administrative action. The patents issued to settlers for the land being void, it was within the power of the Government to secure their cancelation, United States v. Minnesota (270 U.S. 181), and to restore the land to the plaintiff. Government officials having charge of the affairs of the Creek Nation took no steps to have the erroneous patents canceled and possession of the land restored to the plaintiff after the passage of the act of June 21, 1906, and the matter was allowed to drift until May 24, 1924, when jurisdiction was conferred on this court to "hear, examine, and adjudicate and render judgment" on the plaintiff's claim.

The plaintiff being the owner of the land, is legally and equitably entitled to be placed in possession of it. The court, however, is without authority to put the plaintiff in possession of the land, and has jurisdiction only to render a money judgment for its value. This being true, we think the plaintiff is entitled to judgment for the value of the land as of the date of the institution of this suit, July 3, 1926. Its fee simple title to the land held for more than ninety years has never been extinguished. It was the owner of the land on the date of the institution of its suit, and is the owner of the land now. That it has long been denied the right to possess and occupy the same does not in any way affect its title to the land or its right to be restored to the possession of the same. Plaintiff is now suing to recover the value of the lands which it owned in fee on the date of the filing of its suit. Certainly a judgment of the court based on the 1873 or the 1891 value would not give the plaintiff either legal or equitable compensation for the land. We hold therefore, that the plaintiff is entitled to recover the value of the land as of the date of the bringing of its suit. It has been within the power of the Government, at all times since the erroneous inclusion of the plaintiff's land in the Sac and Fox Reservation, and since it was erroneously opened to settlement and patented to homesteaders in 1891, to have the value of the lands appraised and to pay for the same by direct appropriation by Congress, or to, by an appropriate jurisdictional act, authorize the plaintiff to bring suit on its claim and have the value of the lands in controversy judicially determined. Had the Government pursued either of these courses the plaintiff would have been entitled to receive and would have received the value of its lands as of the date of its compensation for them. However, nothing was done to right the great wrong

perpetrated upon the plaintiff, by the repeated errors of the Government, until it was given the right to bring suit in this court under the act of May 24, 1924. We think, therefore, the plaintiff is entitled as a matter of law, as well as in equity and good conscience, to receive the value of its lands as of the date of the bringing of its suit.

The value of the land involved is entirely a question of fact to be determined by the evidence. We have found the value of the land for all purposes, including its surface, lease, and royalty values, is $30 per acre.

A tract consisting of 170.49 acres was located in the extreme southern part of the 5,575.57-acre tract. Of this 170.49-acre tract 118.4 acres were patented to settlers and were also subsequently allotted to members of the Creek Tribe. Deeds for the entire 118.4 acres
23 were made by chiefs of the Creek Nation to individual Indian allottees, and were duly approved by the Secretary of the Interior. The Creek Nation having divested itself of title to this 118.4 acres of land can not maintain suit for recovery of the value of the same under the jurisdictional act of May 24, 1924.

The remaining 52.09 acres of the 170.49-acre tract were sold as unallotted land of the Creek Nation. The Creek Nation, however, has received no money for any part of the 52.09 acres so sold, except 2.88 acres sold to James H. Kean. The defendant is entitled to credit for this 2.88-acre tract, making a total of 121.28 acres out of the 5,575.57 acres erroneously included in the Darling survey for which plaintiff cannot recover.

Plaintiff, therefore, is entitled to recover the sum of $163,628.70, the value of 5,454.29 acres, less the amount the defendant is entitled to recover on its counterclaim, which will next be considered.

DEFENDANT'S COUNTERCLAIM

Pursuant to article 2 of the treaty of March 24, 1832 (7 Stat., 366), 20 sections of land within Benton and Chambers Counties, Alabama, were reserved for the "orphan children of the Creeks." The act of March 3, 1837 (5 Stat. 186), authorized the President to sell the land, and if he thought proper, to invest the whole or any part of the purchase money in stocks, and to pay the interest to the persons entitled thereto. Pursuant to the act, the land in question was sold and the proceeds realized therefrom invested in interest-bearing State bonds. The principal of the fund thus created was carried on the books of the United States Treasury under the heading "Creek Orphan Fund" and the interest thereon was carried under the heading "Interest on Creek Orphan Fund."

It was claimed by the Creek Nation at various times subsequent to the establishment of the aforesaid Creek Orphan Fund that certain disbursements from the interest thereon were made for purposes not contemplated by the treaty of 1832. Finally it was determined by Congress in 1882 that there had been expended without authority

of law, and without the consent of the Creek orphans, $69,956.68 for general purposes of the Creek Nation, and $106,799.68 for support of loyal refugees of the Creek Nation during and following the Civil War.

By the act of August 7, 1882 (22 Stat. 301), the aforesaid sum amounting to $176,755.97, with interest thereon from April 6, 1872, was appropriated for the purpose of reimbursing the Creek Orphan Fund for the sums thus improperly disbursed. By the said act it was provided:

"That the Secretary of the Interior is hereby authorized and instructed to charge the sum of sixty-nine thousand nine hundred and fifty-six dollars and sixty-eight cents, used for general purposes of the Creek Nation, against the general fund of said nation, and said sum shall be retained by the Secretary of the Interior in such installments as shall not seriously embarrass the object of the annual appropriations for the support and necessities of the Creek Nation; but nothing in this act contained shall be construed to prevent the United States from asserting its right to be reimbursed by the Creek Nation in any future settlements therewith the further sum of one
24 hundred and six thousand seven hundred and ninety-nine dollars and sixty-eight cents, expended by the United States out of the Creek Orphans Fund for the support of loyal Creek refugees."

The defendant has presented a counterclaim for the aforesaid expenditures, and asks that they be set off against the amount of judgment awarded to the plaintiff on its claim. The defendant is clearly entitled to recover on its counterclaim as to the $69,956.68 item. These funds were disbursed for general purposes of the Creek Nation and are proper charges to be made against it by the Government.

The report of the General Accounting Office in the case of The Creek Nation v. United States, H–510, shows that only $6,848.83 of the $106,603.29 disbursed from "interest on the Creek Orphan Fund" for the relief of refugee Indians during the years 1863 to 1867, was in fact expended for the benefit of the citizens of the Creek Nation, and that the balance thereof was expended for the benefit of members of other tribes of Indians. The sum expended by the United States for the care of refugee Creek Indians was an expenditure properly chargeable to the Creek Nation, and the defendant is entitled to recover $6,848.83 on this item of its counterclaim.

Our conclusion therefore is, that the plaintiff is entitled to recover $163,628.70 on its petition. The defendant is entitled to recover the sum of $76,805.51 on the two items of its counterclaim.

The plaintiff is entitled to a judgment in the sum of $86,823.19, and judgment in that amount is hereby ordered to be entered.

WHALEY, Judge; LITTLETON, Judge; and GREEN, Judge; concur.

BOOTH, Chief Justice, took no part in the decision of this case on account of illness.

25 VI. *Judgment*

At a Court of Claims held in the city of Washington on the 13th day of March, A.D. 1933, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is entitled to recover from the United States the sum of $163,628.70, and that the defendant is entitled to recover from the plaintiff on its counterclaim the sum of $76,805.51.

It is adjudged and ordered that the plaintiff recover of and from the United States the sum of eighty-six thousand eight hundred twenty-three dollars and nineteen cents ($86,823.19).

VII. *Proceedings after entry of judgment*

On May 10, 1933, the defendant filed a motion for new trial.

On December 4, 1933, the court entered the following order on said motion:

Order

It is ordered this 4th day of December, A.D. 1933, that the defendant's motion for new trial be and the same is hereby overruled.

26 [Clerk's certificate to foregoing transcript, omitted in printing.]

(Endorsement on cover:) File No. 38,437. Court of Claims. Term No. 834. The United States, petitioner, vs. The Creek Nation. Petition for a writ of certiorari and exhibit thereto. Filed March 2, 1934. File No. 834 O.T. 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1934

23 Supreme Court of the United States

Order allowing certiorari

Filed April 9, 1934

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. ——

THE UNITED STATES, PETITIONER

v.

THE CREEK NATION

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General on behalf of the United States prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above case March 13, 1933.

OPINION BELOW

The opinion of the Court of Claims is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered March 13, 1933. Motion for new trial was overruled December 4, 1933. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether under the jurisdictional act which authorizes the Court of Claims to "render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian affairs," there is authority to award a judgment against the United States arising out of an error or errors of its officers, or arising out of its failure in its alleged duty as guardian of the tribe to secure the restoration to said tribe of possession of lands owned by the tribe.

(2) Whether, if the tribe is entitled to recover, the measure of damages should be the full value of the fee as of the time of the filing of the petition, or whether the recovery should be measured as in trespass, namely, the injury to the land and mesne profits.

(3) Whether an erroneous survey approved by the Commissioner of the General Land Office whereby land belonging to the Creek Tribe was placed within the boundaries of the Sac and Fox Reservation and thereafter, pursuant to a cession of the Sac and Fox Reservation to the United States, erroneously patented to settlers, constituted a taking of said land or any interest therein by the United States.

STATUTE INVOLVED

The material provisions of the Jurisdictional Act of May 24, 1924, c. 181, 43 Stat. 139, under which the cause of action was brought, are as follows:

> SEC. 1. That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States. * * *
>
> SEC. 3. In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian nation, but any payment which may have been made by the United States upon any claim against the United States shall not operate as an estoppel, but may be pleaded as an offset in such suit.

STATEMENT

The material findings of fact of the court below may be summarized as follows:

The action was brought under the authority of the Act of Congress approved May 24, 1924 (43

Stat. 139; Special Finding 1), conferring jurisdiction upon the Court of Claims "to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims * * * arising under or growing out of any act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States, * * *"

By the Treaty of February 14, 1833 (7 Stat. 417; Special Finding II) between the Creek Nation and the United States, the United States granted to said nation in fee simple a tract of land in what is now known as the State of Oklahoma. Thereafter by Treaty of June 14, 1866, between the same parties (14 Stat. 785; Special Finding III), the Creek Nation ceded to the United States the western one-half of the lands granted as aforesaid. Article 8 of the last-named treaty contains the following provisions:

> It is agreed that the Secretary of the Interior forthwith cause the line dividing the Creek country, as provided for by the terms of the sale of Creek lands to the United States in article third of this treaty, to be accurately surveyed under the direction of the commissioner of Indian affairs, the expenses of which survey shall be paid by the United States. (14 Stat. 785, Special Finding III.)

In 1871 one Bardwell, under the direction of the Indian Office, and pursuant to the provisions of the last-named treaty, surveyed the line dividing the

Creek lands. Although the survey thus made may not have correctly divided said lands, as was contemplated under the treaty, any error therein made is not material here, because that controversy was settled by an agreement whereby the Creek Nation ceded to the United States "without reservation or condition, full and complete title to the entire western half of the domain of the said Muscogee (or Creek) Nation lying west of the division line surveyed and established under the said treaty of eighteen hundred and sixty-six," and also granted and released to the United States "all and every claim, estate, right, or interest of any and every description in or to any and all land and territory whatever, except so much of the said former domain of the said Muscogee (or Creek) Nation as lies east of the said line of division, surveyed and established as aforesaid, and is now held and occupied as the home of said nation." (Act of March 1, 1889, c. 317, 25 Stat. 757, 758; Findings IV and V.)

On February 18, 1867, a treaty was entered into between the United States and the Sac and Fox Indians, whereby the United States ceded to said Indians, as a reservation, a tract of land not exceeding 750 square miles in the Indian Territory south of Kansas, the reservation to be selected under the direction of the Secretary of the Interior (15 Stat. 495, 496). It developed that the land selected for the Sac and Fox reservation lay within the Creek land ceded to the United States under the

Treaty of June 14, 1866, *supra* (14 Stat. 785). Following the treaty between the Sac and Fox Indians and the United States, one E. N. Darling, in 1872, made a survey of the Sac and Fox reservation and in doing so erroneously ran his division lines between the Creek lands and the Sac and Fox reservation into the Creek domain, thereby including as a part of the Sac and Fox reservation 5,575.57 acres of Creek land. The Darling survey was examined and approved by the Commissioner of the General Land Office on February 15, 1873. (Findings VII, VIII, IX.) In 1875, one Hackbush made a resurvey of Darling's section lines and subdivided the sections into forty acre tracts. In so doing he perpetuated the errors of Darling. Both the Darling and the Hackbush surveys were examined and approved by the General Land Office without knowledge of the errors. (Finding X.)

By an agreement entered into between the Sac and Fox Nation and the United States, approved by Act of Congress of February 13, 1891 (26 Stat. 749), the Sac and Fox Nation ceded all of its reservation to the United States. The agreement provided that, after certain allotments had been made to the Sac and Fox Indians, the residue of the land ceded should become public lands of the United States and subject to white settlement. The 5,575.57 acres of land erroneously included in the Sac and Fox reservation was thereupon opened to settlement and patents to settlers were subsequently issued by the United States. (Findings XI, XII, XIII.)

Controversies arose with respect to the errors in said surveys (see opinion, p. 8, original); thereupon resurveys of the west boundary of the Creek Nation were made in 1895, 1896, and 1905, through which the original boundary line as established by Bardwell was determined to be the west boundary line of the Creek Nation. Thereafter Congress, by Act approved June 21, 1906 (34 Stat. 325, 364), declared the line as established by Bardwell in 1871 and reestablished by the surveys of 1895 and 1896, to be the west boundary of the Creek Nation. (Finding XIV.)

As a result of the erroneous survey by Darling in 1872, plaintiff has been deprived of the use and occupation of the 5,575.57 acres since the date of the Darling survey, with the exception of 118.4 acres which were allotted to members of the Creek Nation and 2.88 acres which were sold as unallotted lands of the Creek Nation. (Finding XV, XVI.)

The court made no finding with respect to value other than as set forth in Finding XIX, as follows:

> The fair average market value, for all purposes, of the land involved, was on July 23, 1926, $30.00 per acre. This value includes the surface, lease, and royalty values.

Whereupon the court allowed plaintiff to recover the sum of $163,628.70, found to be the full value of the land on the date the petition was filed, and held that defendant was entitled to recover from plaintiff on its counter-claim the sum of

$76,805.51. Judgment for plaintiff in the sum of $86,823.19 was thereupon entered.

The petition substantially sets forth the facts as herein stated and seeks a recovery on the theory that it was the duty of the United States, having "entire control of the affairs of" plaintiff, to procure the restoration of possession of the tract of land involved to plaintiff, and having failed in this duty the United States is liable to plaintiff for the full value of the land.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the Jurisdictional Act authorizes a recovery on a claim arising out of the failure of the United States to secure the restoration to the Creek Nation of possession of the lands involved.

2. In holding the correct measure of damage to be the value of the land for all purposes, including its surface, lease, and royalty values as of the date the petition was filed.

3. In holding that a "taking" of the land by the United States was not accomplished either by the approval of the Commissioner of the General Land Office of the erroneous Darling survey of 1872, whereby the land was included within the Sac and Fox reservation, or by the opening of said land to settlement and issuance of patents to settlers thereon pursuant to the cession of the Sac and Fox reservation.

REASONS FOR GRANTING THE WRIT

The court below held, in opposition to petitioner's contention, that the facts did not show a taking of respondent's land. It was the theory of petitioner, on the trial below, that there was a taking of the 5,575.57 acres of respondent's land either by virtue of the approval of the General Land Office of the erroneous survey made by Darling, which placed the land within the boundaries of the Sac and Fox reservation, or by the disposal of the lands under the general land laws to settlers following the cession to the United States by the Sac and Fox Indians.

If the court below was correct in holding that there was not a taking, then the judgment for respondent must rest upon one of the following grounds: (a) that petitioner is liable for the errors committed by Surveyor Darling and the Commissioner of the General Land Office, or (b) that petitioner is liable for violation of its duty as a fiduciary to procure the restoration of possession of the land to respondent.

But Congress has not conferred upon the court the authority to adjudicate and award a judgment on a claim based upon either of said grounds. The Jurisdictional Act limits the jurisdiction of the court to claims "arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any Act of Congress in

relation to Indian affairs." That is to say, the claim must grow out of a violation of a contractual obligation, or a violation of a right which has become vested by virtue of an Act of Congress relating to Indian affairs.

In many cases heretofore decided this Court has found it necessary to pass upon the scope of Jurisdictional Acts containing substantially the same language as that employed in the instant Act, and without exception has held to the ruling that such Acts must be strictly construed, *Blackfeather* v. *United States,* 190 U.S. 368, 379; *Price* v. *United States and Osage Indians,* 174 U.S. 373; that they make no admissions of liability, *United States* v. *Mille Lac Chippewas,* 229 U.S. 498, 500; and that they do not confer jurisdiction to entertain a claim founded upon a moral obligation or failure in the performance of a political function, *United States* v. *Old Settlers,* 148 U.S. 427, 469; *United States* v. *Choctaw Nation,* 179 U.S. 494, 533; *Barker* v. *Harvey,* 181 U.S. 481.

The decision of the court below is in conflict with the decision of the same court rendered in the case of *Choctaw and Chickasaw Nations* v. *United States,* 75 C.Cls. 494, wherein plaintiffs proceeded under the authority of a Jurisdictional Act which contained the same language, with relation to the scope of jurisdiction, as that used in the instant Act. In that case a recovery was sought upon the ground that the United States had failed in its duty as the guardian of the Indians to take proper steps for the

collection of rentals and for taking forfeitures on railroad station reservations. A demurrer to the petition was sustained. Chief Justice Booth, speaking for the court, in part said (p. 497):

> It is difficult to ascribe to plaintiffs' cause of action any other grounds than an omission to perform a duty cast upon the Government, as the plaintiffs claim by law. If the Government was solely responsible for the loss complained of as a trustee or guardian of the plaintiffs' lands and property, and in that capacity the only party legally capable of asserting plaintiffs' rights in court, and as such negligently refused and continues to refuse to act, this, in our opinion, is a direct and specific allegation of omission to perform a duty, and plaintiffs' cause of action is predicated upon the common law liabilities pertaining to the relationship of guardian and ward. * * *

(Page 499:)

> The policy of the Government as to its relationship with Indian tribes and Indian tribal lands and property is a political one with which we have nothing to do, and until legislation is enacted concerning ancient treaties or acts of Congress the court is without authority to proceed, and even then may not proceed except strictly within the limits and intent of the special act, for it is established law that special jurisdictional acts are to be strictly construed by the court and implications as to jurisdiction under their terms forbidden. *Blackfeather*

v. *United States,* 190 U.S. 368, *Price* v. *United States and Osage Indians,* 174 U.S. 373.

The record in this case fails to show that petitioner has by treaty, agreement, or law of Congress assumed the common law liability of a guardian or a trustee of respondent with reference to the matters herein involved, or admitted a liability for inadvertent or unauthorized acts of its officers.

It seems clear that the only theory upon which a recovery for respondent is justified under the Jurisdictional Act is that the fee to the land, or a lesser estate therein, was taken by the petitioner under the authority of an Act of Congress. A taking is not accomplished by an act of an executive officer of the Government without such authority whether the act be intentional or otherwise. *Bigby* v. *United States,* 188 U.S. 400; *United States* v. *North American Transportation & Trading Company,* 253 U.S. 330, 334.

MEASURE OF DAMAGE

The injury has arisen either out of a taking of the land or out of a continuing trespass. The court below having held that there was not a taking, the damages awarded necessarily arise from the trespass. In view of the fact that the Government is never a trespasser (*Pope* v. *United States,* 26 C.Cls. 11, 13), such trespass must have been committed by the Sac and Fox tribes of Indians and by the patentees of the petitioner.

Therefore if under the Jurisdictional Act there is authority to award a judgment against petitioner to compensate respondent for losses caused by petitioner's failure to perform the alleged duty as guardian of respondent of procuring the restoration of possession of the land to respondent, or for a trespass brought about through errors of officers of petitioner, it is urged that the measure of damage is precisely the same as would apply in a case where the action was against the trespasser, namely, injury to the land and mesne profits. However, the court below awarded a recovery for the full value of the land as of the time of the filing of respondent's petition, thereby adopting the same measure of damages as would be applicable if there had been a taking of the entire interest of respondent in the land on that date.

That the court below committed error in determining the measure of damage is apparent for the further reason that although the judgment does not destroy the Indians' title to the property, or their right of possession, the award is made to cover its full value as if all right, title, and interest therein had been taken. The bar of former adjudication would be unavailing in an action to recover for trespass accruing subsequent to the judgment. It is a well-established rule that in a trespass or a series of trespasses which amount to an appropriation or an attempt to appropriate the land itself or its use to the use of the trespasser, damages are to be assessed for the trespass only and not for the

permanent appropriation of the land. *Stowers* v. *Gilbert*, 156 N.Y. 600.

Upon the authority of the decision in the case of *Fort Berthold Indians* v. *United States*, 71 C.Cls. 308, and other decisions of the same court, it was the contention on behalf of petitioner in the court below that the acts of the officers of petitioner, as set forth in the findings, constituted a taking of the land by petitioner and that the damages for the taking should be held to be the value of the land as of the date of such taking.

If under the correct view of the case there was a taking, it follows that the court below has erred in its determination of the amount of damages.

It is therefore contended:

(a) That if the court below correctly held that there was not a taking, the petition of respondent should be dismissed for want of jurisdiction.

(b) If, however, there was a taking or if under the Jurisdictional Act respondent is entitled in law to recover for losses arising either from the errors of petitioner's officers, or arising out of petitioner's failure to perform its alleged duty as guardian of respondent of procuring the restoration of possession of the lands to respondent, the court below has adopted an erroneous measure of damages.

WHEREFORE, it is respectfully submitted that the petition should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

MARCH, 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1934

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 2

THE UNITED STATES, PETITIONER

v.

THE CREEK NATION

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered March 13, 1933. A motion for a new trial was overruled December 4, 1933 (R. 21). The petition for a writ of certiorari was filed March 2, 1934, and was granted April 9, 1934 (R. 23). The jurisdiction of this Court rests upon Section 3(b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939 (U.S.C., Title 28, Sec. 288).

QUESTIONS PRESENTED

(1) Whether under the jurisdictional Act which authorizes the Court of Claims to "adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian affairs", which the Creek Nation or Tribe may have against the United States, there is authority to award a judgment against the United States for damages arising either out of errors of its officers in making or approving a survey of lands, or arising out of its failure in its alleged duty as guardian of the tribe to secure the restoration to the tribe of possession of lands owned by the tribe.

(2) Whether, if the tribe is entitled to recover on the theory that the United States is liable for failure to secure possession of the lands to the tribe, the measure of damages should be the full value of the fee as of the time of filing the petition, as held by the court below, or whether the recovery should be measured as in trespass, namely, the injury to the land and mesne profits.

(3) Whether an erroneous survey approved by the Commissioner of the General Land Office whereby land belonging to the Creek Tribe was placed within the boundaries of the Sac and Fox Reservation and thereafter, pursuant to a cession

of the Sac and Fox Reservation to the United States, erroneously patented to settlers, constituted a taking of said land or interests therein by the United States.

STATUTE INVOLVED

The material provisions of the Jurisdictional Act of May 24, 1924, c. 181, 43 Stat. 139, 140, under which the cause of action was brought, are as follows:

> That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States: * * * *
>
> * * * * *
>
> SEC. 3. In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian nation, but any payment which may have been made by the United States upon any claim against the United

States shall not operate as an estoppel, but may be pleaded as an offset in such suit.

STATEMENT

The material findings of fact of the court below may be summarized as follows:

The action was brought under the authority of the Act of Congress approved May 24, 1924, c. 181, 43 Stat. 139, (Special Findings I, R. 5–7), conferring jurisdiction upon the Court of Claims "to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States, * * *."

By the Treaty of February 14, 1833, 7 Stat. 417 (Special Finding II, R. 7), between the Creek Nation and the United States, the United States granted to the Creek Nation in fee simple a tract of land in what is now the State of Oklahoma. Thereafter by Treaty of June 14, 1866, 14 Stat. 785 (Special Finding III, R. 7), between the same parties, the Creek Nation ceded to the United States the western one-half of the lands granted as aforesaid. Article VIII of this treaty contained the following provisions (14 Stat. 788):

It is agreed that the Secretary of the Interior forthwith cause the line dividing the

> Creek country, as provided for by the terms of the sale of Creek lands to the United States in article third of this treaty, to be accurately surveyed under the direction of the commissioner of Indian affairs, the expenses of which survey shall be paid by the United States.

In 1871 one Bardwell, under the direction of the Indian Office, and pursuant to the provisions of the last-named treaty, surveyed the line dividing the Creek lands. Although the survey thus made may not have correctly divided said lands, as was contemplated under the treaty, any error therein made is not material here, because the controversy upon this question was settled by an agreement whereby the Creek Nation ceded to the United States "without reservation or condition, full and complete title to the entire western half of the domain of the said Muscogee (or Creek) Nation lying west of the division line surveyed and established under the said treaty of eighteen hundred and sixty-six", and also granted and released to the United States "all and every claim, estate, right, or interest of any and every description in or to any and all land and territory whatever, except so much of the said former domain of the said Muscogee (or Creek) Nation as lies east of the said line of division, surveyed and established as aforesaid, and is now held and occupied as the home of said nation." Act of March 1, 1889, c. 317, 25 Stat. 757, 758 (Findings IV and V, R. 7–8).

On February 18, 1867, a treaty was entered into between the United States and the Sac and Fox Indians, whereby the United States ceded to these Indians, as a reservation, a tract of land not exceeding 750 square miles in the Indian Territory south of Kansas, the reservation to be selected under the direction of the Secretary of the Interior (Article VI, 15 Stat. 495, 496). Thereafter an area was selected immediately west of the Creek reservation but one Darling, in making a survey in 1872 of the Sac and Fox reservation, pursuant to the treaty with these Indians, erroneously ran his division lines between the Creek lands and the Sac and Fox reservation into the Creek domain, thereby including as a part of the Sac and Fox reservation 5,575.57 acres of Creek land. The Darling survey was examined and approved by the Commissioner of the General Land Office on February 15, 1873. (Findings VII, VIII, IX, R. 8–9.) In 1875, one Hackbush made a resurvey of Darling's section lines and subdivided the sections into forty-acre tracts. In so doing he perpetuated the errors of Darling (Finding X, R. 9). Both the Darling and Hackbush surveys were examined and approved by the General Land Office without knowledge of the errors (Findings VIII and X, R. 9).

By an agreement entered into between the Sac and Fox Nation and the United States, approved by Act of Congress of February 13, 1891, c. 165, 26 Stat. 749, the Sac and Fox Nation ceded all of

its reservation to the United States. The agreement provided that, after certain allotments had been made to the Sac and Fox Indians, the residue of the land ceded should become public lands of the United States and subject to white settlement. The 5,575.57 acres of land erroneously included in the Sac and Fox reservation was thereupon opened to settlement and patents to settlers were subsequently issued by the United States (Findings XI, XII, XIII, R. 9–10).

Controversies arose with respect to the errors in the surveys above referred to (see opinion below, R. 13); thereupon resurveys of the west boundary of the Creek Nation were made in 1895, 1896, and 1905, through which the original boundary line as established by Bardwell was determined to be the west boundary line of the Creek Nation. Thereafter Congress, by Act approved June 21, 1906, c. 3504, 34 Stat. 325, 364, declared the line as established by Bardwell in 1871 and reestablished by the surveys of 1895 and 1896 to be the west boundary of the Creek Nation (Finding XIV, R. 10).

As a result of the erroneous survey by Darling in 1872, the Creek Nation has been deprived of the use and occupation of the 5,575.57 acres since the date of the Darling survey, with the exception of 118.4 acres which were allotted to members of the Creek Nation and 2.88 acres which were sold as unallotted lands of the Creek Nation (Findings XV, XVI, R. 10).

The court made no finding with respect to value other than as set forth in Finding XIX, as follows (R. 11):

> The fair average market value, for all purposes, of the land involved, was on July 3, 1926 [the date the petition was filed in the Court of Claims], $30.00 per acre. This value includes the surface, lease, and royalty values.

Whereupon the court allowed the Creek Nation to recover the sum of $163,628.70, found to be the full value of the land on the date the petition was filed, and held that the United States was entitled to recover from the Creek Nation on its counterclaim the sum of $76,805.51 (R. 11). Judgment for the Creek Nation in the sum of $86,823.19 was thereupon entered (R. 21).

The petition below substantially set forth the facts as herein stated and sought a recovery on the theory that it was the duty of the United States, having "entire control of the affairs of" respondent, to procure the restoration of possession of the tract of land involved to respondent, and having failed in this duty the United States is liable to respondent for the full value of the land (R. 3, 4).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the jurisdictional Act authorized a recovery on a claim arising out of the failure

of the United States to secure the restoration to the Creek Nation of possession of the lands involved.

2. In holding the correct measure of damages to be the value of the land for all purposes as of the date of the bringing of the action.

3. In holding that a "taking" of the land by the United States was not accomplished either by the approval of the Commissioner of the General Land Office of the erroneous Darling survey of 1872, whereby the land was included within the Sac and Fox reservation, or by the opening of the land to settlement and issuance of patents to settlers thereon pursuant to the cession of the Sac and Fox reservation.

SUMMARY OF ARGUMENT

The jurisdictional Act limits the jurisdiction of the Court to claims "arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian affairs." The petition predicates the tribe's right to recovery upon the failure of the United States to take action on behalf of the tribe to restore possession of the lands involved to the tribe (R. 3). The court below, although holding that the acts of the United States with respect to the lands did not constitute a "taking", awarded a judgment for the full value of the lands as of the date of the filing of the petition. The judgment of the court below, therefore,

rests upon one of the following grounds: (a) that the United States is liable for the errors of Surveyor Darling and the Commissioner of the General Land Office, or (b) that the United States is liable for violation of its duty as a fiduciary to procure the restoration of possession of the lands to the tribe. It is the contention of the petitioner that the jurisdictional Act does not authorize a recovery based upon either of said grounds.

If, however, the court below correctly held that the jurisdictional Act authorizes a judgment founded upon errors of Government officers, or upon the failure to procure the restoration of possession of the lands to the tribe, it is then the contention of the petitioner that the court below has adopted an erroneous measure of damages. The court below having held that there was not a taking, the injury necessarily arises out of a trespass. Notwithstanding the rule that recovery in a case of trespass is limited to the damage to the land and mesne profits, the court below awarded a recovery of the full value of the land as of the date the petition in the case was filed.

ARGUMENT

I

SCOPE OF JURISDICTIONAL ACT

Under the jurisdictional Act consent is given that the United States may be sued by the Greek Nation or Tribe of Indians on any legal or equitable

claim arising under or growing out of any treaty or agreement between the United States and said tribe of Indians or arising under or growing out of any Act of Congress relating to Indian affairs. Notwithstanding the failure of the special findings of the court below to disclose the violation by the petitioner of any treaty obligation or the violation by petitioner of any right of respondent acquired by virtue of an Act of Congress relating to Indian affairs, that court has awarded a judgment in favor of the respondent.

At the trial of this case in the court below, the petitioner defended upon the theory that there had been a "taking" of the respondent's lands; that such "taking" was accomplished either by the approval of the erroneous Darling survey which placed the lands within the boundaries of the Sac and Fox reservation, or by the subsequent issuance of patents to settlers following the cession of the Sac and Fox reservation, and that the respondent's recovery should be the value of the lands as of the date of "taking." Although the court below found that there had not been a "taking" of the lands by the petitioner or any interest therein, a judgment was rendered against the petitioner for an amount found to be the full value of the land as of the date of the institution of the respondent's action.

It will be observed from the opinion of the court below (R. 18) that the judgment of the court is predicated upon the principle that the petitioner

is liable for its failure to secure the restoration of possession of the lands to the respondent. If such a duty arose at all, it arose out of a political relationship, and not out of a contractual obligation; and the jurisdictional Act does not authorize a judgment based upon a failure to perform such a duty. *United States* v. *Old Settlers,* 148 U.S. 427, 469; *United States* v. *Choctaw Nation,* 179 U.S. 494, 533.

In the case of *Choctaw and Chickasaw Nations* v. *United States,* 75 C.Cls. 494, the language of the jurisdictional Act with respect to the scope of jurisdiction is the same as that used in the instant Act. In that case the tribes presented a claim arising out of the failure of the United States, as a fiduciary, to take proper steps for the collection of rents and for taking forfeitures on railroad station reservations. In the opinion sustaining a demurrer to the petition Chief Justice Booth, speaking for the Court, said (pp. 497–498):

> It is difficult to ascribe to plaintiffs' cause of action any other grounds than an omission to perform a duty cast upon the Government, as the plaintiffs claim by law. If the Government was solely responsible for the loss complained of as a trustee or guardian of the plaintiffs' lands and property, and in that capacity the only party legally capable of asserting plaintiffs' rights in court, and as such negligently refused and continues to refuse to act, this, in our opinion, is a direct and specific allegation of

omission to perform a duty, and plaintiffs' cause of action is predicated upon the common law liabilities pertaining to the relationship of guardian and ward.

If it should be said that the judgment of the court below is justified for the reason that the injury complained of has arisen out of errors of officers of the petitioner, the answer is that the jurisdictional Act does not consent that the petitioner be sued on such a claim. It is plain that the jurisdictional Act limits the right of suit to claims arising out of contractual obligations, or claims arising out of a violation of a right which has become vested by virtue of an Act of Congress. Jurisdictional Acts must be strictly construed, *Price* v. *United States and Osage Indians*, 174 U.S. 373, 375, and they make no admission of liability, *United States* v. *Mille Lac Chippewas*, 229 U.S. 498, 500.

It is the petitioner's view that a judgment for the respondent is justified only upon a finding that the fee to the land or a lesser estate therein has been taken by the petitioner.

II

MEASURE OF DAMAGE

If the court below correctly held that there was not a "taking" of the respondent's land or any interest therein, then the injury to the respondent necessarily arises out of trespasses committed by

the Sac and Fox Indians and afterward by settlers who went upon the land under patents which did not convey title. The petitioner was not, and could not be, a trespasser (*Pope* v. *United States*, 26 C.Cls. 11, 13).

Therefore if under the jurisdictional Act there is authority to award a judgment against the petitioner to compensate the respondent for losses caused by the petitioner's failure to perform the alleged duty as guardian of the respondent of procuring the restoration of possession of the land to the respondent, or for a trespass brought about through errors of officers of the petitioner, it is urged that the measure of damage is precisely the same as would apply in a case where the action was against the trespasser, namely, injury to the land and mesne profits. However, the court below awarded a recovery for the full value of the land as of the time of the filing of the respondent's petition, thereby adopting the same measure of damages as would be applicable if there had been a taking of the entire interest of the respondent in the land on that date.

That the court below committed error in determining the measure of damage is apparent for the further reason that although the judgment does not destroy the Indians' title to the property, or their right of possession, the award is made to cover its full value as if all right, title, and interest therein had been taken. The bar of former adjudication

would be unavailing in an action to recover for trespass accruing subsequent to the judgment. It is a well-established rule that in a trespass or a series of trespasses which amount to an appropriation or an attempt to appropriate the land itself or its use to the use of the trespasser, damages are to be assessed for the trespass only and not for the permanent appropriation of the land. *Stowers* v. *Gilbert,* 156 N.Y. 600.

Upon the authority of the decision in the case of *Fort Berthold Indians* v. *United States,* 71 C.Cls. 308, and other decisions of that court, it was the contention on behalf of the petitioner in the court below that the acts of the officers of the petitioner, as set forth in the findings, constituted a taking of the land by the petitioner and that the damages for the taking should be held to be the value of the land as of the date of such taking.

If under the correct view of the case there was a taking, it follows that the court below has erred in its determination of the amount of damages.

CONCLUSION

It is therefore contended that:

(a) If the court below correctly held that there was not a taking, the petition of the respondent should be dismissed for want of jurisdiction.

(b) If, however, there was a taking or if under the jurisdictional Act respondent is entitled in law to recover for losses arising either from the errors

of the petitioner's officers, or arising out of the petitioner's failure to perform its alleged duty as guardian of the respondent of procuring the restoration of possession of the lands to the respondent, the court below has adopted an erroneous measure of damages.

Wherefore, it is respectfully submitted that the judgment of the court below should be reversed.

J. CRAWFORD BIGGS,
Solicitor General.
HARRY W. BLAIR,
GEORGE C. SWEENEY,
Assistant Attorneys General.
GEORGE T. STORMONT,
WILFRED HEARN,
Attorneys.

SEPTEMBER 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1934

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Office Supreme Court, U.

Supreme Court of the United

OCTOBER TERM, 1933.

No. 2

THE UNITED STATES, PETITIONER,

VS.

THE CREEK NATION, RESPONDENT.

RESPONDENT'S BRIEF OPPOSING WRIT OF CERTIORARI.

R. J. Van Cooper,
Paul M.
Attorneys for

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Supreme Court of the United States

OCTOBER TERM, 1933.

No. 834.

THE UNITED STATES, PETITIONER,

VS.

THE CREEK NATION, RESPONDENT.

RESPONDENT'S BRIEF OPPOSING WRIT OF CERTIORARI.

On page two of its petition, petitioner gives the "questions presented." We will answer these in the order given.

Petitioner's First Question.

"Whether under the jurisdictional act which authorizes the Court of Claims to 'render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian affairs,' there is authority to award a judgment against the United States arising out

> of its failure in its alleged duty as guardian of the tribe to secure the restoration to said tribe of possession of lands owned by the tribe."

Petitioner is in error in suggesting that we claim under a common-law liability based upon the relationship of guardian and ward. While petitioner was under a duty assumed by treaty to put respondent in possession of this land, even this need not be relied upon. Congress in 1906, after "extensive investigations as to every phase of the controversy," declared, in explicit language, that the land in dispute belonged to the Creek Nation (R. p. 17). It also passed Section 18 of the Act of April 26, 1906 (34 Stat. 137). The relevant parts of such Section 18 are as follows:

> "Sec. 18. That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes . . . for . . . recovery of any land claimed by any of said tribes . . ., and the United States courts in Indian Territory are hereby given jurisdiction to try and determine all such suits. . . ."

That above act, although permissive in form, was in fact mandatory is well settled. 25 R. C. L. 770; *Supervisors* v. *U. S.*, 4 Wall. 435, 18 U. S. (L. Ed.) 419; *French* v. *Edwards*, 13 Wall. 506, 20 U. S. (L. Ed.) 702; *Jaffray* v. *McGehee*, 107 U. S. 361, 27 U. S. (L. Ed.) 495.

Petitioner's Second Question.

> "(2) Whether, if the tribe is entitled to recover, the measure of damages should be the full value of the fee as of the time of filing the peti-

tion, or whether the recovery should be measured as in trespass, namely, the injury to the land and mesne profits."

Congress finding its former mandates unheeded passed the jurisdictional act which is before us. At any time before judgment petitioner could have defeated respondent's claim by placing it in possession of this land. But, to quote the language of the trial court:

(R. p. 18:) "The act (of June 21, 1906) clearly contemplated the restoration of the land to the Creek Indians through appropriate administrative action . . . . Government officials having charge of the affairs of the Creek Nation took no steps . . . and the matter was allowed to drift . . . until May 24, 1924, when jurisdiction was conferred on this court to 'hear, examine and adjudicate and render judgment' on plaintiff's claim.

"The plaintiff, being the owner of the land, is legally and equitably entitled to be placed in possession of it. The court, however, is without authority to put the plaintiff in possession of the land, and has jurisdiction only to render a money judgment for its value."

Petitioner's Third Question.

"(3) Whether an erroneous survey approved by the Commissioner of the General Land Office whereby land belonging to the Creek Tribe was placed within the boundaries of the Sac and Fox Reservation and thereafter, pursuant to a cession of the Sac and Fox Reservation to the United States, erroneously patented to settlers, constituted a taking of said land or any interest therein by the United States."

As petitioner answers its own question on page 12 of its petition we quote:

"A taking is not accomplished by an act of an executive officer of the Government without such authority (an act of Congress) whether the act be intentional or otherwise."

We respectfully submit that the petition should be denied.

Respectfully submitted,

E. J. VAN COURT,
PAUL M. NIEBELL,
Attorneys for Respondent.

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 2.

THE UNITED STATES, PETITIONER,

VS.

THE CREEK NATION, RESPONDENT.

BRIEF FOR RESPONDENT.

E. J. VAN COURT,
PAUL M. NIEBELL,
W. W. SPALDING,
Counsel for Respondent.

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February 14, 1833, 7 Stat. 417, 418, 419 21
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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 2.

THE UNITED STATES, PETITIONER,

VS.

THE CREEK NATION, RESPONDENT.

BRIEF FOR RESPONDENT.

MAY IT PLEASE THE COURT:

This is an appeal granted by this court to the United States from a decision of the Court of Claims holding that respondent was entitled to recover the amount of $86,823.19 for the value of 5,575.55 acres of land owned by the Creek Nation, respondent.

Before proceeding with our argument, let us suggest that the decision of the Court of Claims in this case has not the wide application that opposing counsel evidently believe. Other than the Five Civilized Tribes only one very small tribe holds its land under a fee simple title, and in so far as these six tribes are con-

cerned, there are but very few cases involving the question before us. Since the "wild tribes," as they are commonly referred to, hold only "a right of occupancy" to land, the question in this case can have no application to them.

STATEMENT OF THE CASE.

This is an action filed in the Court of Claims by respondent, the Creek Nation, against the United States under a special jurisdictional act approved May 24, 1924 (43 Stat. 139), which act is fully set out in the special findings of fact (R. 4 and 5). All of the material facts, and all of the relevant portions of the treaties and acts involved, appear in the special findings of fact of the court below (R. 7 to 11).

The opinion of the court below in this action is fully set out in the record, pages 12 to 21.

ISSUES IN COURT BELOW.

In this case the defendant below is petitioner, and the plaintiff below is respondent.

Plaintiff, the Creek Nation, contended (R. 14) that since it owned this land in fee simple, and since the Court of Claims was unable to render a judgment, either putting it in possession of the land or requiring defendant, the United States, to enforce the acts of Congress passed for its benefit, and thereby place it in possession of the land, it should be entitled to recover the value of the land as of the date of filing the petition herein.

Defendant admitted its liability to pay plaintiff for the land in question, but contended (R. 14) that there was a "taking" of the land, either in 1873 or in 1891, and that plaintiff should recover the value of the land as of one of these dates, and not later.

The above issue was the sole one presented to the trial court, and upon which it held that plaintiff was entitled to recover the value of the land as of the time of filing the petition in this case.

NEW ISSUES INJECTED BEFORE THIS COURT.

By raising questions of jurisdiction, petitioner has undertaken in the petition for certiorari to raise several issues not before the court below, and, in effect, to obtain a trial *de novo* in this court. After making clear our position upon the issue presented to the court below, we will discuss this new matter thus injected by petitioner.

ARGUMENT.

By the Treaty of February 14, 1833 (R. 7), the United States granted in fee simple to the Creek Nation a large body of land in what is now the State of Oklahoma.

By the Treaty of June 14, 1866 (R. 7), the Creek Nation ceded "the west half of their entire domain" to the United States, and it was agreed by such treaty that the Secretary of the Interior should cause a north and south line dividing the ceded territory from that retained, "to be accurately surveyed."

In 1871, Frederic W. Bardwell, pursuant to the provisions of the above-mentioned treaty, surveyed a line intended to be the division line provided by said treaty (1866). However, this line was not "accurately surveyed," and it was later discovered that the Bardwell line took a portion of the land retained by the Creek Nation under the treaty.

Following a controversy on this score, Congress, by the Act of March 3, 1885 (R. 8), made provision for the withholding from the Creek Nation of certain payments due it on other matters unless it should accept without reservation or condition this erroneous Bardwell line. This mandate was duly accepted by the Creek Nation through its council, and the Bardwell line, right or wrong, thus became (without compensation to the Creek Nation for land taken by it) the line between the ceded territory and that retained by the Creek Nation (R. 7 and 8).

Just at this point, let us pause to impress upon the court that although the Creek Nation thus lost, without compensation, a portion of its domain, retained and guaranteed to it by the Treaty of June 14, 1866, by being forced to accept the Bardwell line, yet it makes no claim for payment of these lands in this suit. Since our interpretation of the special jurisdictional act, under which the Creek Nation is permitted to sue the United States, is that only suits can be brought which are based upon treaties or acts of Congress passed for its *benefit,* it would be precluded from attacking this Act of 1885, which does "take" or confiscate Creek lands. The whole effect of this Act of 1885 (R. 8) was to establish most solemnly and firmly the Bardwell line as the west boundary of the Creek Nation. It will also be noticed that the Bardwell line was, by Section 1 of the Act of Congress approved May 2, 1890 (26 Stat. 81, 82), made a part of the boundary line between Oklahoma Territory and the Indian Territory (R. 8).

Inception of the Present Controversy.

In 1867 the United States granted to the Sac and Fox Indians a portion of the Creek lands ceded by the Treaty of 1866, located immediately west of the Creek reservation and divided from it by the Bardwell line (Finding VII, R. 8, 9).

E. N. Darling in 1872 divided the Sac and Fox reservation into sections. Darling erroneously ran his division lines into the Creek domain, and his closing corners were placed some distance beyond the Bardwell line and upon land owned by the Creek Nation. Later,

one Hackbush resurveyed Darling's section lines, and subdivided the sections into 40-acre tracts, perpetuating the errors so made by Darling (R. 9 and 13).

Let us here make one thing clear—Darling and Hackbush *ran* no boundary lines, but Darling's "closing corners," placed east of the Bardwell line, *made* a line; hence we have what may be *called for convenience,* the Darling "line." It is evident, from a reading of the record, that Darling commenced his work of sectionizing in the western part of the Sac and Fox reservation, and when reaching the Bardwell line, ran across it merely for the purpose of avoiding the making of a tier of fractional sections. Without discovery of the errors, the Darling and Hackbush surveys were approved by the Commissioner of the General Land Office (R. 9).

Still without discovery of the errors, in 1891 the Sac and Fox reservation was declared public land and opened to homestead settlement (R. 9, 10).

Following the opening of the land to settlement, numerous complaints were made to the Indian Office and to the Land Office as to the conflicting claims of homesteaders and Creeks to the land in question. The United States Geological Survey, therefore, in 1895 and 1896, resurveyed the west boundary of the Creek Nation as surveyed by Bardwell in 1871. From these surveys the errors made by Darling clearly appear, and the fact was established that 5,575.55 acres of Creek land lay between the Bardwell line and the Darling "line." The Creek Nation, from that time until now, has continuously and persistently asserted its right and title to the land, and has repeatedly urged before Congress

its right to be restored to the possession of the same (R. 13 and 14).

Controversy Placed Before Congress.

In 1906 this controversy was brought to the attention of Congress. Congress at the time was informed of all the facts relating to plaintiff's claim. The record discloses that committees of both the Senate and House had repeatedly made exhaustive investigations as to every phase of the controversy (R. 17). Congress, after a full investigation, by an act approved June 21, 1906 (34 Stat. 325, 364), declared:

> "That the boundary line between the Creek Nation, Indian Territory, and the Territory of Oklahoma, as surveyed by Frederic W. Bardwell in eighteen hundred and seventy-one, and re-established by the Geological Survey in eighteen ninety-six is hereby declared to be the west boundary line of the Creek Nation."

Of this act the Court of Claims, in its opinion (R. 17), says:

> "The Act of June 21, 1906, must be regarded as conclusive as to the Creek Nation's right and title to the land in controversy as of that date. The act clearly contemplated the restoration of the land to the Creek Indians through appropriate administrative action."

At the same session Congress, undoubtedly with the present controversy in mind, and to give the administrative officers of the United States Government full power to remedy the condition now before us, also

passed Section 18 of the Act of April 26, 1906 (34 Stat. 137), the relevant parts of which are as follows:

> "Sec. 18. That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes • • • for • • • recovery of any land claimed by any of said tribes • • •, and the United States courts in Indian Territory are hereby given jurisdiction to try and determine all such suits • • •."

That above act, although permissive in form, was in fact mandatory, is well settled. 25 R. C. L. 770; *Supervisors* v. *United States,* 4 Wall. 435, 18 U. S. (L. Ed.) 419; *French* v. *Edwards,* 13 Wall. 506, 20 U. S. (L. Ed.) 702; *Jaffray* v. *McGehee,* 107 U. S. 361, 27 U. S. (L. Ed.) 495.

No Action Taken by the Administrative Officers of the United States.

What has been done since the passage of the Act of 1906? *Nothing.* The Court of Claims, in its opinion (R. 18 and 19), says:

> • • • "The patents issued to settlers for the land being void, it was within the power of the Government to secure their cancellation, *United States* v. *Minnesota* (207 U. S. 181), and to restore the land to the plaintiff. Government officials having charge of the affairs of the Creek Nation took no steps to have the erroneous patents canceled and possession of the land restored to the plaintiff after the passage of the Act of June 21, 1906, and the matter was allowed to drift until May 24, 1924, when jurisdiction was conferred on this court to 'hear, examine, and adjudicate and render judgment' on the plaintiff's claim.

• • • "It has been within the power of the Government, at all times since the erroneous inclusion of the plaintiff's land in the Sac and Fox Reservation, and since it was erroneously opened to settlement and patented to homesteaders in 1891, to have the value of the lands appraised and to pay for the same by direct appropriation by Congress, or to, by an appropriate jurisdictional act, authorize the plaintiff to bring suit on its claim and have the value of the lands in controversy judicially determined. Had the Government pursued either of these courses the plaintiff would have been entitled to receive and would have received the value of its lands as of the date of its compensation for them. However, nothing was done to right the great wrong perpetrated upon the plaintiff, by the repeated errors of the Government, until it was given the right to bring suit in this court under the Act of May 24, 1924, • • •."

To Sue for the Value of This Land in This Action Is the Only Possible Relief Available to the Creek Nation.

As we have seen, this whole matter was exhaustively brought to the attention of Congress in 1906, and that from that date to the present day the administrative officials of the Government have utterly failed to take any action under the statutes passed for the benefit of the Creek Nation.

Here we have a peculiar situation—one which has never occurred before in all history, and is most unlikely to occur again: The Creek Nation, a political entity, owns this land in fee simple, but for over forty years has not been permitted to enjoy it, for the reason that the petitioner, through its administrative officers, is the only one that could enforce its rights in the courts. These officers have failed and refused to act, and have permitted a con-

tinued and unlawful intrusion upon these lands, making them as useless to the Creek Nation as though the Creek Nation did not own them. Although the Creek Nation's title has been in no way impaired or destroyed, yet, let us repeat, this fact of its ownership is, in so far as any enjoyment has resulted or will result, a mere empty word.

By the special jurisdictional act under which this suit is brought, the Creek Nation, for the first time in its history, is permitted to sue in its own name. In conferring this right upon the Creek Nation Congress selected a forum in which this claim could be heard, a court of its own choosing, which could give judgment only against the United States, and which can render a money judgment only. This act also provides that this claim shall be forever barred if not brought within five years after the passage of this act.

Had Congress so elected, it could have placed the Creek Nation in the same position it had placed the administrative officers, and thus permitted it to bring suit in a court which could have entertained an action in ejectment, and which could have granted a recovery of its land, but, instead, it has confined the Creek Nation to the relief which we now seek.

As we have said before, this is, indeed, a unique situation. Were the Creek Nation *sui juris* it could of itself terminate this unwarranted and continued intrusion upon its lands—an intrusion which could now be terminated by the United States and which it is the duty of the United States to terminate. Since this intrusion utterly deprives the Creek Nation of the value of these

lands, and will for all time continue to deprive it of their value, to make the Creek Nation whole the only measure of damages which could possibly be fixed is the value of the land.

Petitioner's Original Contention in the Court Below.

As we have heretofore stated, the sole issue in the court below upon which the case was tried, was the date at which the value of the land involved must be fixed. In its opinion (R. 14) the Court of Claims says:

> • • • "Up to this point in the case the plaintiff and the defendant are in substantial agreement. They agree that the 5,575.57 acres of land involved lie between the Bardwell line on the west and the Darling line on the east; that it was erroneously included as a part of the Sac and Fox Reservation by Darling in his survey, and that the plaintiff is entitled to compensation for the value of the land. The real issue between them is the question of the value of the land. The determination of this question hinges entirely upon the date at which such value is rightly computable. The ascertainment of this date, therefore, is the first question for decision • • •"

Thereafter, the trial court in its opinion (R. 14, 15), gives at length the contention as stated in petitioner's brief filed in the trial court. In summing up this contention, it states:

> • • • "In other words, did the administrative act of the Commissioner of the General Land Office in approving an erroneous survey divest the plaintiff of its fee title to the land involved—a thing that Congress itself could only do, and that by the use of specific language leaving no room for doubt as to its intention? We think not • • •"

The trial court further says:

> • • • "The defendant cites no authority in support of the contention • • •, and we know of no authority that does support it."

To the contrary, all the authorities hold that a "taking" is not accomplished by an act of an executive officer of the Government, unless such authority is delegated to him in plain and unambiguous language. *Bigby* v. *United States*, 188 U. S. 400; *United States* v. *North American Transportation & Trading Company*, 253 U. S. 330, 334; *United States* v. *A Certain Tract of Land in Cumberland Tp.*, 70 Fed. 940; *United States* v. *Rauers*, 70 Fed. 748; *Boston, etc., R. Corp.* v. *Salem, etc., R. Co.*, 2 Gray. 36.

The Act of June 21, 1906 (34 Stat. 325, 364), Is Decisive of the Fact That There Was No "Taking" Prior Thereto.

We deem it useless to weary the court with an extended argument to prove that petitioner's contention below, that there was any sort of a "taking" prior to 1906, is entirely without merit, for we have shown above that by the Act of June 21, 1906, *supra*, Congress itself with the whole controversy before it has declared to the contrary. We believe that we can urge without hesitation that this Act of 1906 is absolutely conclusive against the contention of petitioner which we have discussed. Petitioner does not claim, nor could it claim, that there has been any "taking" since the passage of the Act of 1906, for nothing whatever has been done to alter the situation as it stood in 1906.

The trial court, in discussing the Act of June 21, 1906 (R. 18), says:

> "Under these circumstances, and with the undoubted intent and purpose of settling definitely all questions growing out of the various treaties, statutes, and administrative acts of officials of the Indian Office and the General Land Office dealing with the title to the land in controversy, Congress again, as it had done in the Acts of March 3, 1885, March 1, 1889, and May 2, 1890, declared the Bardwell line to be the western boundary of the Creek Nation. The Act of June 21, 1906, must be regarded as conclusive as to the Creek Nation's right and title to the land in controversy as of that date. * * *"

RESPONDENT'S REPLY TO PETITIONER'S CONTENTIONS.

In its brief, petitioner raises three questions for decision by this court (Pet. Br. 2). Question 3 was the only one raised in the court below. That there was no "taking" is answered by the trial court in its opinion and also in the foregoing discussion.

By raising a question of jurisdiction, petitioner discusses Questions 1 and 2 which were not before the trial court, evidently for the purpose of attempting to obtain in this court a trial *de novo* thereon.

We will take up Questions 1 and 2 in the order in which they appear in petitioner's brief.

Petitioner's First Question.

> "(1) Whether under the jurisdictional act which authorizes the Court of Claims to 'adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States

and the Creek Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian Affairs,' which the Creek Nation or Tribe may have against the United States, there is authority to award a judgment against the United States for damages arising either out of errors of its officers in making or approving a survey of lands, or arising out of its failure in its alleged duty as guardian of the tribe to secure the restoration to the tribe of possession of lands owned by the tribe."

Petitioner is again in error in stating respondent's cause of action, in that it contends that we claim under the common-law liability of a guardian and ward relationship existing between the Creek Nation and the United States. This we could not do, and did not do. We were well aware that under the special jurisdictional act the Creek Nation could not maintain suit to recover on a common-law liability.

A reference to the petition filed in the court below (R. 1, 2, 3) shows that this cause of action is based upon a violation of the Treaties of February 14, 1833, and June 14, 1866, and the failure of the administrative officers of the United States to perform the duties required of them by Congress under the Acts of April 26, 1906, and June 21, 1906, heretofore set forth and discussed.

Under the Treaty of 1833 the United States granted in fee simple to the Creek Nation lands which are now in the State of Oklahoma. Under the Treaty of 1866 the west half of said lands were ceded to the United States, and the east half reserved to the Creek Nation. After providing for the cession, the Treaty further provides:

> "Art. III. * * * the eastern half of said Creek lands, being retained by them, shall, * * * be forever set apart as a home for said Creek Nation."

Again, in Article I of said Treaty of 1866, it is provided that:

> "the United States guarantees them quiet possession of their country, * * *."

Would not the permitted intrusion on the land in question be a violation of these treaty obligations and be sufficient, of itself, to give the Court of Claims jurisdiction of this controversy under the special jurisdictional act?

However, respondent does not need to rely upon the violation of the Treaty of 1866 alone, for Congress thereafter passed the Act of June 21, 1906, after "extensive investigations as to every phase of the controversy," which act declared in explicit language that the land in dispute belonged to the Creek Nation (R. 17).

In the same session, Congress also passed the Act of April 26, 1906, Section 18 of which authorized the administrative officers of the United States to put the Creek Nation in possession of the land by appropriate court action. Surely the failure to perform this plain duty is, of itself, a basis for this claim under the terms of the special jurisdictional Act of 1924.

The cases cited by petitioner are inapplicable to the situation before this court. The case of *Choctaw and Chickasaw Nations* v. *United States,* 75 Ct. Cls. 494, chiefly relied upon by petitioner, holds in effect that the Creek Nation could not sue the United States under the special jurisdictional act for a common-law liability aris-

ing out of a guardian and ward relationship. It is significant that the Court of Claims decided both of these cases, and had the distinction between these cases well in mind when it decided this case in favor of the Creek Nation.

Surely the petitioner could not question the right of Congress to pass the Act of April 26, 1906, and the Act of June 21, 1906, under which acts the Creek Nation now claims the benefits set forth therein, for it is well settled that Congress has plenary power over the administration of the Five Civilized Tribes, *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294. A review of the cases cited by petitioner would lead to this inference.

Summing up respondent's position on this question: It is evident that the Creek Nation does not claim under the common-law liability of a guardian and ward relationship; but, on the other hand, bases its claim upon the violation of the Treaty of 1866, and the failure and refusal of the administrative officers of the United States to perform the duties required of them under the Acts of Congress of April 26, 1906, and June 21, 1906, each of which violations or failures is, of itself, a sufficient basis for this claim of the Creek Nation under the special jurisdictional Act of May 24, 1924.

Petitioner's Second Question.

> "(2) Whether, if the tribe is entitled to recover on the theory that the United States is liable for failure to secure possession of the lands to the tribe, the measure of damages should be the full value of the fee as of the time of filing the petition, as held by the court below, or whether the recovery should be measured, as in trespass, namely, the injury to the land and mesne profits."

Were the Creek Nation *sui juris* there might be merit to this contention of petitioner that the measure

of damages would not be the value of the land, for it could then have sued the trespasser in ejectment and could have recovered possession of the land and also for the injury to the land and mesne profits.

However, petitioner's contention overlooks the fact that the Creek Nation is not *sui juris*, and, although owning the fee to the land in dispute, has been unable to possess it, and cannot now secure possession of it except by action of the officers of the United States under the Acts of 1906, yet because of the failure of the petitioner's officers it is forced to stand helplessly by while others enjoy the possession of its land.

The Creek Nation is not suing the United States for the trespass, for the United States is not the trespasser, although the United States, because of the series of almost unbelievable errors of its officers, is responsible for the trespass. The cause of action is for the failure of the United States to place the Creek Nation in possession of its lands, and for its violation of the treaties and acts of Congress passed for the very purpose of placing it in possession.

Since the passage of the Acts of 1906, nothing has been done to correct this failure of the officers of the United States to comply with their duties under these acts, and the trespass will continue forever because it appears that these officers will not perform their duties under these acts.

With the whole history of this controversy before it, Congress passed the special jurisdictional Act of May 24, 1924, authorizing the Court of Claims to:

> "hear, examine and adjudicate and render judgment in *any* and *all* legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian affairs,

which said Creek Nation or Tribe may have against the United States, * * *" (italics ours).

Section 2 of this same act provides that:

> "*Any* and *all* claims against the United States within the purview of this act shall be forever barred unless suit be instituted or petition filed as heretofore provided in the Court of Claims within 5 years from the date of approval of this act, and such suit shall make the Creek Nation party plaintiff and the United States party defendant" (italics ours).

Congress here selects the forum which is to hear and determine *any* and *all* claims, both legal and equitable, which grow out of treaties and acts of Congress, and then provides that the Creek Nation shall be *forever* barred unless it files suits within five years of its passage. Had the Creek Nation failed to file this suit the claim for the value of this land would have been forever barred, and it would be forever dispossessed of this land.

On the other hand, the officers of petitioner could have prevented this suit by putting the Creek Nation in possession of this land, and could have done so at the time this suit was filed. Instead, the petitioner has elected to defend this action.

Under this unique state of facts, what is the measure of damages due the Creek Nation for the failure of petitioner's officers to perform their duties under the Acts of 1906? To give the Creek Nation merely the mesne profits will not wholly compensate it for this land, for it would still be dispossessed of the land. To make it whole the only measure of damages is the value of the land at the time of the filing of this suit.

The following language of this court in *United States* v. *State of Minnesota*, 270 U. S. 181, 70 L. Ed.

539, 46 Sup. Ct. Rep. 298, is helpful in determining the question before us:

> "* * * The value should be determined on the basis of the prices which would have been controlling had the particular lands been dealt with as they should have been * * *."

How should this land have been dealt with? Had an almost unbelievable series of errors never been committed against it the Creek Nation would be *now* in possession of this land. Had the mandates of Congress, conveyed in the Acts of 1906, been heeded, the Creek Nation would be *now* in possession of this land.

The court below concluded as follows:

> "We think, therefore, the plaintiff is entitled as a matter of law, as well as in equity and good conscience, to receive the value of its lands as of the date of the bringing of its suit."

Under the judgment of the Court of Claims the Creek Nation is made whole, and is, under the terms of the jurisdictional act, forever barred from bringing further suits against the United States for this or any claim not heretofore filed. Moreover, the effect of the present case, if affirmed by this court, will be to establish ownership in the patentees of the United States who are now in possession of the land in question. By accepting the consideration for the complete title to such lands, the Creek Nation will be effectively estopped thereafter to claim title to the land. *Allen* v. *Colorado Central R. R. Co.*, 22 Colorado 238; *Cape Girardeau R. R. Co.* v. *Southern Illinois Bridge Co.*, 215 Mo. 286.

"Wild Tribe" Cases Inapplicable.

The measure of damages in the "wild tribe" cases could have no application to the question in this case.

As stated before, the "wild tribes" hold merely a "right of occupancy" to their lands, the fee being in the United States. An intrusion on their lands would entirely destroy their possession, and would give rise to a cause of action for the value of this "right of occupancy" at the time of its destruction. The case of the *Ft. Berthold Indians* v. *United States*, 71 Ct. Cl. 338, cited by petitioner (Pet. Br. 15) is just such a case; therefore, it would have no application to the case before us. In this case the Creek Nation holds the fee simple title to the land in question, and the intrusion here would not deprive it of the fee to said land.

As few tribes own their lands in fee, the cases will be few indeed that will be affected by this decision.

CONCLUSION.

We respectfully submit that the Court of Claims did not err in compensating the Creek Nation for the value of its land, and in holding that it had jurisdiction under the special jurisdictional Act of May 24, 1924, to rectify the wrong arising and growing out of the violation of the Treaty of 1866, and the failure of the officers of the United States to perform the duties required of them by Congress under the Acts of April 26, 1906, and June 21, 1906.

In the appendix to this brief may be found copies of the various treaties and Acts of Congress that we deem material to this case.

Respectfully submitted,

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W. W. Spalding,
Counsel for Respondent.

APPENDIX.

Treaty of February 14, 1833, 7 Stat. 417, 418, 419:

(Article II contains description of the grant of land in fee simple by the United States to the Creek Nation.)

Article III. "The United States will grant a patent, in fee simple, to the Creek Nation of Indians for the land assigned said nation by this treaty or convention, whenever the same shall have been ratified by the President and Senate of the United States—and the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation, and continue to occupy the country hereby assigned them."

Treaty of June 14, 1866, 14 Stat. 785, 786, 788:

Article I. "* * * the United States guarantees them quiet possession of their country * * *"

Article III. "* * * the eastern half of said Creek lands, being retained by them, shall, * * * be forever set apart as a home for said Creek Nation."

Article VIII. "It is agreed that the Secretary of the Interior forthwith cause the line dividing the Creek country, as provided for by the terms of the sale of Creek lands to the United States in article third of this treaty, to be accurately surveyed under the direction of the Commissioner of Indian Affairs, the expenses of which survey shall be paid by the United States."

Act of March 3, 1885, 23 Stat. 362, 367:

"Provided, however, That no part of the above sum shall be paid unless the Creek Nation shall, within twelve months, and in pursuance of a resolution of its national council first had and obtained, make and file in the office of the Secretary of State an acceptance and ratification of the survey made and approved by the Department under the treaty of June fourteenth, eighteen hundred and sixty-six; and the additional lands acquired by the United States by the survey shall be held by the United States under the provisions of the treaty of June fourteenth, eighteen hundred and sixty-six; in all, one hundred and ten thousand nine hundred and seventy-three dollars and thirty cents."

Act of March 1, 1889, 25 Stat. 757, 758:

"1. That said Muscogee (or Creek) Nation, in consideration of the sum of money hereinafter mentioned, hereby absolutely cedes and grants to the United States, without reservation or condition, full and complete title to the entire western half of the domain of the said Muscogee (or Creek) Nation lying west of the division line surveyed and established under the said treaty of eighteen hundred and sixty-six, and also grants and releases to the United States all and every claim, estate, right, or interest of any and every description in or to any and all land and territory whatever, except so much of the said former domain of the said Muscogee (or Creek) Nation as lies east of the said line of division, surveyed and established as aforesaid, and is now held and occupied as the home of said nation."

Act of May 2, 1890, 26 Stat. 81, 82:

"Sec. 1. That all that portion of the United States now known as the Indian Territory, except

so much of the same as is actually occupied by the five civilized tribes, • • • is hereby erected into a temporary government by the name of the Territory of Oklahoma. The portion of the Indian Territory included in said Territory of Oklahoma is bounded by a line drawn as follows: • • • thence down said river to the west line of the Creek country, thence along said line to the northwest corner of the Creek country, • • •"

(The west line of the Creek country referred to is the Bardwell line, R. 8.)

Act of Feb. 13, 1891, 26 Stat. 749, 750:

"Article I. The said the Sac and Fox Nation hereby cedes, conveys, transfers, surrenders and forever relinquishes to the United States of America, all their title, claim or interest, of every kind or character in and to the following described tract of land or country in the Indian Territory, to-wit: • • • Beginning at a point on the left bank of the North fork of the Canadian River, where the West boundary line of the Creek Reservation crosses the same; thence North with said West boundary line to the right bank of the Cimarron River, • • •"

(The west line of the Creek Reservation referred to is the Bardwell line, R. 9.)

Act of April 26, 1906, 34 Stat. 137, 144:

"Sec. 18. That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes • • • for • • • recovery of any land claimed by any of said tribes • • •, and the United States courts in Indian Territory are hereby given jurisdiction to try and determine all such suits. • • •"

Act of June 21, 1906, 34 Stat. 325, 364:

"That the boundary line between the Creek Nation, Indian Territory, and the Territory of Oklahoma, as surveyed by Frederic W. Bardwell in eighteen hundred and seventy-one, and re-established by the Geological Survey in eighteen ninety-six is hereby declared to be the west boundary line of the Creek Nation."

Act of May 24, 1924, 43 Stat. 139:

"That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitations, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States: • • •"

"Sec. 2. Any and all claims against the United States within the purview of this act shall be forever barred unless suit be instituted or petition filed as herein provided in the Court of Claims within 5 years from the date of approval of this act, and such suit shall make the Creek Nation party plaintiff and the United States party defendant. • • •"

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 2.

THE UNITED STATES, PETITIONER,

VS.

THE CREEK NATION, RESPONDENT.

PETITION FOR REHEARING OF THE CREEK NATION.

Comes now the Creek Nation, by counsel, and petitions this Honorable Court for a rehearing of the above-entitled cause, for errors of law contained in its opinion of April 29, 1935, which errors of law are now assigned as follows:

1. That the court erred in holding that the action of the land officers of the United States in issuing patents to "Creek" lands, believing them to be "Sac and Fox" lands subject to the act of February 13, 1891, evidenced an intention to take the fee title of the Creek Nation to Creek lands, under that act.

2. That the court erred in disregarding the effect of the acts of April 26, 1906, and June 21, 1906, upon the issues involved in this case.

3. That although holding that the United States was duty bound to recover said Creek lands for the Creek Nation, and that it could have done so at any time up to the filing of this suit, yet, the court erred in holding that the United States should not account to the Creek Nation for the value of these lands at the date of the filing of this suit.

These, in the order of their statement:

I.

In its opinion the court decided the question of the time as of which the value of the lands involved in this suit should be determined upon the action of the land officers of the United States in issuing patents to Creek lands and the alleged confirmation of their action by the United States. The action of the officers represented an erroneous application by those officers of the act of February 13, 1891 (26 Stat. 749, 750).

It is earnestly and respectfully urged that the erroneous application of the act of 1891 to Creek lands and the erroneous issuance of patents thereunder, the officers of the United States believing at the time that they were dealing with Sac and Fox lands, are not a basis for holding that these acts of the administrative officers divested the Creek Nation of any title whatsoever to the lands in question.

By Article I of the Agreement of June 12, 1890, between the United States and the Sac and Fox Nation, as set forth in the act of Congress approved February 13, 1891 (26 Stat. 749, 750), the Sac and Fox Nation ceded to the United States "all their title, claim or interest" to the lands thereinafter described by metes and bounds "beginning at a point on the left bank of the north fork of the Canadian River, where the west boundary line of the Creek Reservation crosses the same; thence north with said west boundary line to the right bank of the Cimarron River," etc., etc.

The court of claims in its findings of fact (Rec. p. 9) found as a matter of fact that the line thus described above was the Bardwell line. The court said:

> "the west boundary line of the Creek Nation constituting the line established by the Bardwell survey."

This description shows clearly that the Sac and Fox cession ratified by the act of February 13, 1891, followed the Bardwell line and did not include any of the lands involved in this litigation.

It is evident that Congress intended that this act of February 13, 1891, should apply only to Sac and Fox lands and not to any lands east of the Bardwell line. That act specifically limits its operation to lands west of the Bardwell line. (Finding of Fact XI of the Court of Claims, Rec. p. 9.)

It is also apparent from the record that the land officers of the United States thought they were dealing with Sac and Fox lands although they issued patents to Creek

lands, for it was not until the last survey was made in 1905 (Finding XIV, Rec. p. 10) that these errors were definitely disclosed to such officers.

The land officers could pass no title to Creek lands under these erroneous patents, for they had no power to convey Creek title to Creek lands under the act of 1891. Therefore, the patents were void *ab initio*. Consequently, they could pass no title to the settlers to whom they were issued. It should be remembered that by the 1891 act Congress expressly limited its operation to Sac and Fox lands west of the Bardwell line. Consequently, the officers of the United States, when issuing patents to Creek lands east of the Bardwell line, believed they were dealing with Sac and Fox lands. That the stipulation of an Indian treaty granting land to an Indian tribe "could not be defeated by the action of any officers of the land department" is well settled. *United States* v. *Carpenter*, 111 U. S. 347.

II.

It is respectfully submitted that the court erred in not giving effect to the acts of April 26, 1906 (34 Stat. 137), and June 21, 1906 (34 Stat. 325, 364).

The act of April 26, 1906, provides in part as follows:

> "Sec. 18. That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes * * * for the * * * recovery of any land claimed by any of said tribes * * *, and the United States courts in Indian Territory are hereby given jurisdiction to try and determine all such suits * * *."

The act of June 21, 1906, contains this provision:

> "That the boundary line between the Creek Nation, Indian Territory, and the Territory of Oklahoma, as surveyed by Frederic W. Bardwell in eighteen hundred and seventy-one, and reestablished by the Geological Survey in eighteen ninety-six, is hereby declared to be the west boundary line of the Creek Nation."

What effect do these acts have upon the present controversy? We respectfully submit that they are material. As a matter of fact, when Congress was informed of the errors made by the officers of the United States, the facts being reported to it by them, the act of June 21, 1906, was passed declaring the Bardwell line to be the west line of the Creek Nation. (Rec. p. 10.) If there were doubts before regarding the true boundary line of the Creek Nation, none could exist after the passage of that act; and any existing cloud on the Creek title to lands east of the Bardwell line arising out of the erroneous issuance of patents was then removed.

In its opinion in this case, the court says:

> "Plainly the appropriation was not in 1873, when Darling's survey was approved by the Commissioner of the General Land Office. That survey did not effect any change in the existing ownership; nor was it intended to do so. The most that can be said of it is that it was done erroneously and, in the absence of correction, might lead to further error.
>
> "But not so of the disposals under the act of 1891. They were intended from their inception to effect a change of ownership and were consummated by the issue of patents, the most accredited type of conveyance known to our law. True, they rested on an erroneous application of the act of 1891 to the

> Creek lands in the strip; *but, as that application was confirmed by the United States, the matter stands as if the act had distinctly directed the disposals.* It was through them that the lands were taken; so the compensation should be based on the value at that time, and not, as ruled below, on the value when the suit was begun." (Italics ours.)

Elsewhere in the opinion the court points out just how the confirmation of the disposals by the United States was effected. We quote from the opinion:

> "True, the tribe, if free and prepared to proceed in its own behalf, might have successfully assailed the disposals; but it was not in a position where it could be expected to assume that burden. It was in a state of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests. Plainly the United States would have been entitled to a cancellation of the disposals had it instituted suits for that purpose. But, although having full knowledge of the facts, it made no effort in that direction. On the contrary, it permitted the disposals to stand—not improbably because of the unhappy situation in which the other course would leave the allottees and settlers. In this way the United States in effect confirmed the disposals; and it emphasized the confirmation by retaining, with such full knowledge, all the benefits it has received from them."

The Bardwell line was first established in 1871. It was reaffirmed in the acts of 1885 (23 Stat. 362, 367), 1889 (25 Stat. 757, 758) and 1891 (26 Stat. 749). In 1895-1896 it was again established by the Geological Survey. We have seen that by the act of June 21, 1906, it was provided that the Bardwell line was the true western boundary line of the Creek Nation.

It is entirely clear that although settlers were in *possession* of the 5,575.57 acres of land here involved they had no lawful *title* thereto; and that *as late as June 21, 1906, Congress, when dealing with the title to such land, not only failed to confirm the 1891 disposals but in effect repudiated them.* The language of the 1906 act is wholly inconsistent with the finding that the United States confirmed the 1891 disposals prior to the passage of the jurisdictional act of 1924. We respectfully suggest that force and effect should be given to the act of June 21, 1906. It deals specifically with the question of the title to the land involved in this litigation. By its express terms it reestablished the Bardwell line. If it had been intended to confirm the 1891 disposals, would Congress have reestablished the Bardwell line as the western boundary line of the Creek Nation, the location of which was wholly inconsistent with such disposals?

We must conclude, therefore, that the United States did not, prior to June 21, 1906, confirm the 1891 disposals, and it is not claimed that any act of confirmation intervened between that date and May 24, 1924, the date of the passage of the jurisdictional act.

The court of claims said:

> * * * It is significant that no official of the Indian Office, of the General Land Office, or of the Department of the Interior having to do with these matters, ever questioned the right or title of the Creek Nation in, or to, these lands, or ever asserted that the United States had title to them at the time they were opened to settlement in 1891. On the contrary, they, without exception, advised Congress that title to the land was in the Creek Nation and that set-

tlers on the land to whom patents had been issued acquired no title to the land thereunder. The Commissioner of Indian Affairs in a report to the Secretary of the Interior, August 7, 1903, said:

"'The Government of the United States is not a guarantor of the area within any description of land patented by it under the laws of the United States * * *. At the time the patents were issued, the land was a part of the property of the Creek Nation. The Government of the United States had no title to it, and, therefore, its patent did not operate to convey the land.'

"The Secretary of the Interior in a report to Congress on April 9, 1906, said:

"'The homestead claimants have no legal title to the land in the Creek Nation east of the Bardwell line patented to them, and * * *.'

"The Secretary of the Interior in this report recommended to Congress that the 5,575.57 acres be appraised at their cash value and that payment therefor be made to the Creek Nation."

The report of the Secretary of the Interior was made to Congress in 1906 and was the basis upon which it reaffirmed the Bardwell line as the west boundary of the Creek Nation. In the consideration of the act, Congress refused to provide that the Creek Nation should be paid an amount equal to the value of the lands in 1906. From the history of the case, it is entirely clear that Congress, in so refusing to provide for payment of the 1906 value, had in mind the restoration of the lands in kind. It is worth while to recall at this point that Congress had only a few months previously passed the act of April 26, 1906, empowering the Secretary of the Interior to recover the lands for the Creek Nation.

For the failure of the United States to restore these Creek lands under the acts of 1906, a new cause of action arose. The *special* jurisdictional act of 1924 provides that the court of claims may adjudicate "all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or tribe, *or arising under or growing out of any act of Congress in relation to Indian affairs.*" (Italics ours.) The duty of the officers of the United States to institute suit for the recovery of the lands in question was mandatory, and a violation of that duty gave rise to a claim by the Indians against the United States. That claim arose out of the acts of 1906.

III.

This court recognized that it was the duty of the United States to restore to the Creek Nation its lands, and that the United States "would have been entitled to a cancellation of the disposals had it instituted suits for that purpose." It is held, however, that the Creek Nation cannot recover the value of the land as of the date of the filing of this suit.

We respectfully suggest that the effect of the court's decision is to give some efficacy to patents which were void *ab initio*. Is not the more acceptable view that the United States, having acquired full knowledge of the facts and being under duty to secure the cancellation of these erroneous patents and to restore the possession of these lands to the Creek Nation, and having made no effort to do so, should not be permitted to avoid payment of the maximum value the Creek Nation could have re-

ceived had the United States done its duty? The duty of the United States to secure a cancellation of the patents was a continuous one after the issuance of the patents. That duty was reaffirmed by the acts of 1906. The failure of the United States to do its duty in this regard would seem to militate against it, and any loss resulting from such failure should be charged against it. It should be kept in mind that the act of 1924 confers jurisdiction on the court of claims to render judgment upon "all legal and equitable claims" arising under treaties and statutes, and that we are concerned here with the breach of duty of a guardian to a ward.

That the United States elected to leave the settlers undisturbed should not affect in any manner the amount of the settlement between the United States, the guardian, and the Creek Nation, its ward. The land was sold to homesteaders by the United States in the years 1896-1905. The court below awarded $30.00 per acre as the value at the date of the institution of this action. The United States could have recovered this land for the Creek Nation *at a time when it was worth $30.00 per acre*, and thus have discharged properly its duty to its ward. Should the ward be permitted to suffer when the guardian is called upon to account for its dereliction of duty?

Instead of recovering the lands, the United States elected to defend this suit. It thus elected to take the consequences of its own breach of duty. Surely the failure of the guardian to do its plain duty for its ward should not deprive the latter of the benefits that would have resulted to it from a correct solution of the problem,

viz., the restoration to it of the lands under the acts of 1906.

We respectfully submit that such an election on the part of the United States to permit the settlers to remain on these Creek lands would not deprive the Creek Nation of the right to the value of these lands as of the date of the filing of this suit, when the duty of the United States to restore the lands continued up until the passage of the act of 1924.

In taking the position in this case that the value of the lands should be determined as of the date of the filing of the petition, we are not unmindful of a line of authorities in eminent domain cases which hold interest from the time of the taking of property is suitable compensation for the delay in making payment of just compensation under the constitution. The latest of these cases that has come to our attention is *Jacobs* v. *United States*, 290 U. S. 13, 18. The facts of the present case, however, are peculiar and, we suggest, call for the application of a different rule. In saying this, we are thinking of the repudiation by Congress of the acts of the land officers of the United States in issuing patents to the lands in question, which is to be taken from the acts of 1906.

Moreover, this is a proceeding under a special jurisdictional act authorizing suits for violations of treaty and other statutory duties, owing by the guardian to the ward, which requires a settlement of both "legal and equitable claims," thus invoking consideration of *equitable* as well as legal principles.

Even in eminent domain cases, when the "taking" is wrongful, as it was in this case, it is well settled that

the court may award the value as of the date of the institution of suit, especially when the intrusion is a continuing trespass. See 20 C. J. 831 and cases cited; *Otter* v. *Manhattan Ry. Co.*, 37 N. Y. S. 982; *Pittsburgh, etc., R. Co.* v. *Perkins*, 31 N. E. 350. This principle was applied in settlements between private parties, and it should have even greater force here involving the guardian's violations of its treaty and statutory duties.

For these reasons, we earnestly and respectfully request that the Creek Nation be granted a rehearing on the matters specifically set forth herein.

Respectfully submitted,

PAUL M. NIEBELL,
W. W. SPALDING,
Counsel for Creek Nation.

SUPREME COURT OF THE UNITED STATES.

No. 2.—October Term, 1934.

The United States, Petitioner,
vs.
The Creek Nation.

On Writ of Certiorari to the Court of Claims.

[April 29, 1935.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This is a suit by the Creek Nation or Tribe of Indians against the United States to recover compensation for certain lands of that tribe charged to have been appropriated by the United States. The tribe obtained a judgment and we granted a petition by the United States for certiorari. The suit was brought in 1926 under the act of May 24, 1924, c. 181, 43 Stat. 139, which declares:

> "That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian affairs, which said Creek Nation, or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States."

In the course of the suit the United States set up certain cross-demands and recovered judgment thereon; but the judgment on the tribe's claim is all that is challenged now.

The principal facts relating to that claim were conceded below, as shown by the court's opinion and findings, and stand unquestioned here.

Under a treaty of 1833[1] the United States granted to the Creek Tribe, by a patent conveying a fee simple, a large tract of land in Indian Territory, now Oklahoma. By a treaty of 1866[2] the Creeks ceded to the United States the westerly half of that tract, but

[1] Treaty of February 14, 1833, Arts. 2 and 3, 7 Stat. 417.
[2] Treaty of June 14, 1866, Arts. 3 and 8, 14 Stat. 785, 786, 788.

expressly retained the easterly half; and the United States stipulated it would cause a north and south line separating the ceded from the unceded lands to be surveyed under the direction of the Commissioner of Indian Affairs, and guaranteed to the Creeks quiet possession of their unceded lands.

In 1871 one Bardwell, acting under the direction of the Commissioner of Indian affairs, surveyed the divisional line. A controversy soon arose as to whether the line was surveyed too far to the east, and thereby encroached on unceded lands of the Creeks; but that controversy, if not terminated before, was put to rest and the line effectively recognized by an agreement made between the Creek Tribe and the United States in 1889,[3] wherein the tribe's ownership of the lands east of that line was expressly recognized.

In 1867[4] the United States entered into a treaty with the Sac and Fox Indians under which it assigned to them a tract of land within the area ceded by the Creeks and immediately west of the area retained by them.

In 1872 one Darling, a surveyor acting for the government, surveyed the Sac and Fox tract and erroneously extended his lines and closing corners eastward into the unceded Creek lands in disregard of the Bardwell dividing line. Darling's survey was approved by the Commissioner of the General Land Office in 1873; and as a result of this survey and its approval a strip of Creek lands between the Bardwell line and Darling's easterly closing corners, aggregating 5,575.57 acres, was erroneously included within the Sac and Fox tract as officially surveyed and platted, and thereafter was occupied by the Sac and Fox. In 1875 one Hackbusch, a government surveyor, subdivided the sections in the Sac and Fox lands into 40 acre tracts and followed Darling's lines into the unceded Creek lands, thereby perpetuating Darling's error. Hackbusch's survey, like that of Darling, was approved by the Commissioner of the General Land Office.

By an agreement ratified in the act of February 13, 1891,[5] the Sac and Fox ceded to the United States the tract assigned to them under the treaty of 1867. In the agreement the United States stipulated it would make allotments in severalty to the Sac and Fox Indians out of lands within their cession; and the ratifying

[3] Act March 1, 1889, c. 317, 25 Stat. 757, 758.
[4] Treaty of February 18, 1867, Art. 6, 15 Stat. 495, 496.
[5] C. 165, 26 Stat. 749, 750.

act required that these allotments be made and that the remaining lands be opened to settlement as public lands and sold to settlers at a stated price per acre, which was to be turned into the treasury as public money.

In carrying that act into effect the Indian and land bureaus of the United States erroneously treated the strip of unceded Creek lands between Bardwell's line on the west and Darling's closing corners on the east as part of the Sac and Fox cession, and accordingly allotted and patented part of the strip to Sac and Fox Indians, by way of fulfilling the government's obligation to them; sold and patented other lands therein to settlers; and turned the purchase price received from such sales into the treasury as public money. These disposals included nearly all of the 5,575.57 acres in the strip, and the grantees have since been holding the same adversely to the Creek tribe.

In the court below, as its opinion shows, the parties were agreed that the lands in the strip were unceded Creek lands; and that as to such of them as were disposed of under the act of 1891 the Creek tribe is "entitled to compensation". But the parties were not agreed respecting the time as of which the value should be ascertained. The tribe contended for the value in 1926, when the suit was brought; while the government stood for the value at the time of the appropriation, which it insisted was in 1873, when Darling's erroneous survey was approved by the Commissioner of the General Land Office, or, in the alternative, at the time the lands were disposed of under the act of 1891.

The court below held the tribe entitled to the value of the lands, ruled the value at the time of suit should be allowed, found the value at that time was $30 an acre, and gave judgment accordingly. There was no finding of the value at either of the times named in the government's contention; but it is inferable from the record that the value was less at those times than when the suit was begun.

1. Counsel for the government, assuming that the present claim is merely for damages arising out of errors on the part of administrative officers, contend that it does not come within the terms of the jurisdictional act—"any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising

under or growing out of any Act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States". We think the contention is not tenable.

Counsel's assumption ignores several elements of the claim, such as the treaties of 1833 and 1866 and the acts of Congress of 1889 and 1891. It also neglects matters reflecting a confirmation of the acts of the administrative officers, such as the receipt by the United States of direct and material benefits from their acts and its retention of the benefits with knowledge of all the facts.

While the jurisdictional act is couched in general terms, there can be little doubt when it is read in the light of the circumstances leading to its passage that it is intended to include the present claim. The congressional committees on whose recommendation the act was passed were in possession of all data bearing on the claim. The facts had been laid before them in letters from the Secretary of the Interior, the Commissioner of Indian Affairs and the Commissioner of the General Land Office.[6] In the letters these officers, besides reciting the facts in detail, expressed their own conclusions in the matter, which were to the effect that the settlers and allottees had acquired and improved the lands in good faith, and therefore deserved consideration; that the Creek tribe was "entitled to compensation" for the lands "lost" by it through what had been done; that the unfortunate situation "grew out of errors of representatives of the government", which made it reasonable to expect the government to bear the expense of an adjustment; and that there was need for legislation under which the matter could be examined and brought to an equitable and final solution. In view of this portrayal of the matter by the officers specially charged with the administration of Indian and public-land affairs, and the subsequent action of the committees in effecting the passage of the jurisdictional act, we regard it as reasonably manifest that the act is intended to provide for the adjudication of the present claim. The concessions made in the court below by those who were there representing the government show rather plainly that they so understood the act.

2. A question is raised as to whether there was an appropriation or taking of the lands by the United States.

The Creek tribe had a fee simple title, not the usual Indian right of occupancy with the fee in the United States. That title was

[6]Senate Report No. 2561, p. 54, 59th Cong., 1st Sess., and papers named in letter of Secretary of the Interior.

acquired and held under treaties, in one of which the United States guaranteed to the tribe quiet possession. The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that "would not be an exercise of guardianship, but an act of confiscation". *Lane* v. *Pueblo of Santa Rosa*, 249 U. S. 110, 113; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 307-308.

Such was the situation when the lands in question were disposed of under the act of 1891. The disposals were made on behalf of the United States by officers to whom it had committed the administration of that act, and were consummated by the issue of patents signed by the President.

True, the tribe, if free and prepared to proceed in its own behalf, might have successfully assailed the disposals; but it was not in a position where it could be expected to assume that burden. It was in a state of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests. Plainly the United States would have been entitled to a cancellation of the disposals had it instituted suits for that purpose.[7] But, although having full knowledge of the facts, it made no effort in that direction. On the contrary, it permitted the disposals to stand—not improbably because of the unhappy situation in which the other course would leave the allottees and settlers. In this way the United States in effect confirmed the disposals; and it emphasized the confirmation by retaining, with such full knowledge, all the benefits it has received from them.

We conclude that the lands were appropriated by the United States in circumstances which involved an implied undertaking by it to make just compensation to the tribe.[8]

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[7] United States *v.* Minnesota, 270 U. S. 181, 194-196, and cases cited.

[8] United States *v.* Lynah, 188 U. S. 445, 465; United States *v.* North American Company, 253 U. S. 330, 333; Phelps *v.* United States, 274 U. S. 341, 343. And see United States *v.* State Bank, 96 U. S. 30, 36.

3. Plainly the appropriation was not in 1873, when Darling's survey was approved by the Commissioner of the General Land Office. That survey did not effect any change in the existing ownership; nor was it intended to do so. The most that can be said of it is that it was done erroneously and, in the absence of correction, might lead to further error.

But not so of the disposals under the act of 1891. They were intended from their inception to effect a change of ownership and were consummated by the issue of patents, the most accredited type of conveyance known to our law. True, they rested on an erroneous application of the act of 1891 to the Creek lands in the strip; but, as that application was confirmed by the United States, the matter stands as if the act had distinctly directed the disposals. It was through them that the lands were taken; so the compensation should be based on the value at that time, and not, as ruled below, on the value when the suit was begun.

But the just compensation to be awarded now should not be confined to the value of the lands at the time of the taking but should include such addition thereto as may be required to produce the present full equivalent of that value paid contemporaneously with the taking.[9] Interest at a reasonable rate is a suitable measure by which to ascertain the amount to be added.[10] The treaty of 1866, the act of 1889 and other statutes show that five per cent per annum is a reasonable rate as between the parties here.[11]

It follows that the judgment must be reversed, with directions for such further proceedings as may be necessary to bring the award of compensation into conformity with this opinion.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[9]Jacobs *v.* United States, 290 U. S. 13, and cases cited.

[10]United States *v.* Rogers, 255 U. S. 163, 169; Seaboard Air Line Ry. *v.* United States, 261 U. S. 299, 304-306.

[11]Creek Treaty of 1866, Art. 3, 14 Stat. 785, 787; Act of March 1, 1889, c. 317, 25 Stat. 757, 758, 759; U. S. C. Title 25, § 158.